

C A N A D A
PROVINCE DE QUEBEC
DISTRICT DE MONTREAL

C O U R S U P E R I E U R E

sous la présidence de: **L'HONORABLE ANDRE DENIS, J.C.S.**

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JTI-MACDONALD CORPORATION
IMPERIAL TOBACCO CANADA LIMITED
ROTHMANS, BENSON & HEDGES INC.

demandereses,

- C. -

LA PROCUREURE GENERALE DU
CANADA

défenderesse,

- et -

LA SOCIETE CANADIENNE DU CANCER
intervenante.

Volume 6

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Le 22 janvier 2002.

COMPARUTIONS

Me MARC-ANDRE BLANCHARD, Me GERALD R. TREMBLAY, c.r.
Me CHANTAL MASSE, Me YAN PAQUETTE,

pour la demanderesse Rothmans, Benson & Hedges.

Me DOUGLAS MITCHELL, Me CATHERINE MCKENZIE,
Me GEORGES THIBAUDEAU,

pour la demanderesse JTI-Macdonald Corporation.

Me SIMON V. POTTER, Me MARC PREVOST,
Me GREGORY BRIAN BORDAN,

pour la demanderesse Imperial Tobacco Canada Limited.

Me CLAUDE JOYAL, Me MARIE MARMET,
Me MARC RIBEIRO, Me MAURICE REGNIER,
Me GUY GILBERT, c.r. Me JEAN M. LECLERC,

pour la défenderesse.

Me JULIE DESROSIERS, Me CHRISTIAN TREPANIER,
Me ROBERT CUNNINGHAM,

pour l'intervenante.

TABLE DES MATIERES

PAGE

CAUSE CONTINUEE DU 17 JANVIER 2002

LISTE DES PIECES 1037

LISTE DES OBJECTIONS 1039

PREUVE DES DEMANDERESSES (SUITE)

MICHAEL JOHN WATERSON (EXPERT)

cross-examined by Me Régnier 1041

cross-examined by Me Desrosiers 1224

re-examined by Me Potter 1255

DISCUSSIONS 1267

CAUSE CONTINUEE LE 23 JANVIER 2002

LISTE DES PIECES

	<u>PAGE</u>
D-41: Marketing for non-marketing Managers Program	1050 1987
D-42: Memorandum dated May 5, 1987, to Executive Committee, from Mr. Samuel D. Chilcote, Jr., The Tobacco Institute	1054
D-43: Minutes of Tobacco Advertising Working Party's meeting held on January 26th, 1995.	1061
D-44: notes sténographiques du témoignage de M. Waterson lors du premier procès, volumes 15, 16 et 17 de la Cour d'appel.	1118
D-45: Advertisement, Benson & Hedges.	1110
D-46: Rapport de M. Waterson	1110
D-47: Advertisement, Benson & Hedges, <i>Maclean Magazine</i> , March 24, 1986	1123
D-48: Pack of cigarettes, Benson & Hedges.	1124
D-49: Silk Cut Pack of Cigarettes	1127
D-50: Paquet de cigarettes Silk Cut - 10 cigarettes	1131
D-51: Pack of cigarettes, Matinée.	1144
D-52: Document entitled " <i>Milk: repositioning the 'Original' soft drink in Scotland</i> "	1166
D-53: The campaign for generic advertising of tea.	1169

LISTE DES PIECES (SUITE)

D-54:	Scotland: The Health of a Nation	1175
D-55:	Document entitled " <i>Canadian Advertising Success Stories 2000</i> " and Stats Canada Food Consumption for 2000.	1179
D-56:	en liasse, 2 lettres signées de Me Potter, datées du 27 janvier 1993, adressées à M. Bottomley et M. Leany	1201
I-3:	Document entitled " <i>Advertising Works 11 - Cases from the IPA Advertising Effectiveness Awards, Institute of Practitioners in Advertising, 2000</i> " . . .	1243
I-4:	<i>Advertising Works 11, Cases from the IPA Advertising Effectiveness Awards, Institute of Practitioners in Advertising, 2000, edited by Tim Broadbent, 21, Kellogg's Nutri-Grain</i>	1246
I-5:	The British Codes of Advertising and Sales Promotion	1255
P-37:	Study called " <i>Advertising and Alcohol Sales - A Legal Impact Study</i> " by Makowsky and Whitehead	1260
P-38:	Document entitled " <i>The Moderating Influence: A Review of Trade-Sponsored Alcohol Education Programmes</i> "	1261
P-39:	Document entitled " <i>Tobacco Control Country Profiles</i> " from the World Health Organization	1261

LISTE DES OBJECTIONS

	<u>PAGE</u>
Objection #1 (Me Douglas Mitchell) My Lord, I will voice my objection	1054
Objection #2 (Me Simon Potter) Excuse me, My Lord. I'm very sorry, we're asking the witness now to interpret the words...	1065
Objection #3 (Me Simon Potter) My Lord, for the same reasons as invoked before...	1070
Objection #4 (Me Simon Potter) Objection, My Lord, that is a clear misreading of this document...	1073
Objection #5 (La Cour)	1077
Objection #6 (La Cour)	1087
Objection #7 (Me Simon Potter) Bon, alors, Votre Seigneurie, moi, j'aimerais m'objecter même avant qu'il y ait des question posées...	1090
Objection #8 (Me Simon Potter) Already asked, already answered.	1097
Objection #9 (Me Douglas Mitchell) My Lord, may I interject and suggest... .	1097
Objection #10 (à la question 121) Q- Okay. And if he looks on the top of the...	1121
Objection #11 (Me Douglas Mitchell) My Lord, can we really move on to a subject that's relevant...	1129
Objection #12 (Me Douglas Mitchell) My Lord, the witness hasn't read it and hasn't recognized that it's...	1181

LISTE DES OBJECTIONS (SUITE)

Objection #13 (Me Simon Potter)	
The witness has just said he hasn't read this thing...	1184
Objection #14 (Me Simon Potter)	
My Lord, this is not the domain of this witness to say what this document...	1185
Objection #15 (Me Douglas Mitchell)	
My Lord, I'm just going to intervene at this point...	1188
Objection #16 (Me Simon Potter)	
My Lord (...), I have no trouble with letters that I have signed...	1201
Objection #17 (Me Simon Potter)	
Je m'objecte, Votre Seigneurie.	1209
Objection #18 (à la question 314)	
Q- You testified this morning that the price of a twenty (20) cigarette pack...	1228
Objection #19 (à la question 316)	
Q- So, price of cigarettes in the UK would be astronomical?	1229
Objection #20 (Me Simon Potter)	
I'm sorry, that is a misstatement again of this witness's testimony.	1232
Objection #21 (Me Simon Potter)	
My Lord, the lawyer asks the witness, presenting a document, and puts very provocative questions hoping to get the desired answer...	1242
Objection #22 (à la question 396)	
Q- And can you explain to the Court what is the conclusion of that document in relation smoking by youth in Norway?	1262

In the year of Our Lord, two thousand and two (2002) on this
twenty-second (22nd) day of January, PERSONALLY CAME AND
APPEARED:

MICHAEL JOHN WATERSON (EXPERT), witness already heard, 5

WHO, after having made a Solemn Affirmation, doth depose and
say as follows:

CROSS-EXAMINED BY Me MAURICE REGNIER 10
on behalf of the Defendant:

1 Q- You state, sir, in your report that you held the
position of research adviser to the Advertising
Association in the UK for over twenty (20) years, is
that correct? 15

A- That is correct.

2 Q- Would it be correct to describe the Advertising
Association as a lobby group?

A- No, it is not strictly a lobby group. It does some
lobbying work in Brussels and in relation to matters 20
that other parts of the industry can't handle, but it
has two (2) fundamental objectives: one is to produce
statistics and research on behalf of the entirety of
the advertising industry, that is the media companies,
the newspapers, television companies and so on, the 25

advertising agencies and the major advertisers; it also attempts to bring the industry together on contentious matters, so, for example drink advertising, tobacco advertising, regulations relating to fair trading and so on, that affect the entirety of the advertising industry. 5

The AA tends to take a lead position, but it isn't sufficiently big to be in any sense a full-blown lobby group. It's a very small organization and what its usual practice is to try to bring together 10 government organizations and representatives of the various bits of the advertising business, the media companies and so on, in order to come to some agreed position.

So, for example, on drink advertising I spent 15 many years working with the various government departments attempting to come to an agreement on advertising controls. The Advertising Association itself has no control over the control system, but can make suggestions to the industry, and that's the kind 20 of things it tends to do.

I would stress, though, it is a very very tiny organization, comprising largely a major library and a statistical function and a data collection unit relating to research matters and other things affecting 25

the industry as a whole.

3 Q- Well, isn't it a fact, sir, that in the past at least
the Association has lobbied against the ban on tobacco
advertising in various countries?

A- The Association has made representations to the UK 5
Government, having done a lot of research, but its
primary task was to do the research. The lobbying
functions are principally left to the individual
associations that the AA represents, that is the
newspaper companies, the advertising agencies, and the 10
major advertisers, all of whom have much larger
organizations with lobby components.

4 Q- Is it your testimony that in the past the tobacco
industry never retained the services of the Advertising
Association to lobby against the ban on tobacco 15
advertising?

A- The tobacco industry would not be able to retain the
services of the Advertising Association. The services
of the Advertising Association are controlled by a
council, of which I'm a member, which comprises 20
representatives of the three (3) main areas: the
advertisers, the ad agencies and the media companies.
And the Advertising Association Council decides what
program the Advertising Association will follow and it
simply is not available for hire in any sense. It 25

would only do those things that all parts of its membership agree are to the advantage of the whole industry.

So it has done some work in relation to tobacco, particularly in relation to tobacco, drink and food, 5 where the same arguments tend to be advanced against advertising and it has made representations to government, but I must stress they're only a very very small fraction of its activities and it hasn't, I don't believe, has lobbied in relation to tobacco for many 10 years in any sense.

5 Q- And personally, have you ever lobbied on behalf of the tobacco industry against advertising bans?

A- I have been... I have done expert witness work once or twice on behalf of tobacco companies, but most... the 15 majority of my activities in that area have been done on behalf of advertising industry associations of one sort or another, either media associations or advertiser associations or advertising agency associations. 20

6 Q- Have you appeared before committees of the United States Congress in the nineteen eighties (1980's)?

A- Yes, I did.

7 Q- On whose behalf?

A- It was a long time ago and I haven't checked my files 25

in that respect, but I believe it was on behalf of the American Association of Advertising Agencies, the American Advertising Federation, and possibly some media organizations.

8 Q- Have you gone to Hong Kong and debated on behalf of the 5 tobacco companies as well?

A- In Hong Kong, I was invited to put representations to the Hong Kong Government, or a committee of the Hong Kong Government, I believe, and I believe that one was on behalf of the tobacco companies or a tobacco 10 company, I don't remember.

9 Q- Have you gone to Australia as well?

A- I have been to Australia, but that was at the request of the Australian Advertising Federation, which is an advertising-based organization and nothing to do with 15 tobacco.

10 Q- Did you appear before the United Kingdom Department of Health?

A- I have made representations or discussed matters with numerous UK bodies and I... certainly the Department of 20 Health I visited on several occasions, the Department of Trade and so on. Many many times I visited Government departments to talk about advertising.

11 Q- And for what reason did you make representations to the Department of Health? 25

A- I can't... I don't remember precisely because, as I say, there have been numerous occasions when I've been to discuss matters with ministers or ministerial representatives or committees of one kind or another. I have certainly spoken to the Department of Health 5 about drink, and it's quite likely I've spoken to them about tobacco.

I know and I remember speaking to the Department of Health about drink, because I remember the occasion and the Minister, and I can't in the case of tobacco, 10 but it's very likely I have made representations of some description on behalf of tobacco advertising, not the tobacco companies.

12 Q- And isn't it a fact that each time you made these representations, it was to oppose bans on advertising 15 of tobacco or alcohol?

A- I believe that any ban on tobacco or alcohol would not be in any sense effective and would damage the economic system of whichever country implements these bans and, therefore, I would always be opposed, unless I saw 20 evidence to the contrary, to a ban.

13 Q- Now, you said that you attended some seminars organised by the Quebec Industry, that's correct?

A- Seminars, I don't remember saying that, no.

14 Q- No.

25

MICHAEL JOHN WATERSON (EXPERT)
PLAINTIFFS
CROSS-EXAMINATION

A- What sort of seminars?

15 Q- Or programs or, well, would you please repeat your answer, what was the relationship with the tobacco industry that... when you had a contact?

A- I was simply used as an expert witness to talk about 5
advertising in exactly the same way I'm appearing here today, I believe. There may have been one (1) or two (2) instances where I did... I attended a meeting or something. But I simply don't remember them and would, if I ever did something like that, it could only have 10
been a very, very minor part of my activities. I worked very infrequently directly for the tobacco industry, I, only, on only two (2) or three (3), or four (4) perhaps occasions. Most of my work has been done for... directly for the Advertising Association or 15
for other forms of advertising trade body.

16 Q- I'm showing you, sir, a document entitled "Marketing for Non-Marketing Managers Programme", and a copy for the Court. If you turn to the second page of this document, it seems that your name appear on "Wednesday, 20
the twentieth (20th) of May nineteen eighty-seven (1987)". Do you remember having attended this Marketing for Non-Marketing Managers Programme in nineteen eighty-seven (1987)?

A- I do, yes, I didn't attend the forum, it was a speech 25

I gave and I believe it's the only speech of this kind that I've ever given. But it was on the subject of marketing, not on the subject of tobacco.

17 Q- Now, isn't it a fact that this marketing programme was organized by a British American tobacco? 5

A- Yes, it does say "BAT" at the bottom, so, I presume, that's the case.

Me SIMON POTTER:

Just for the assistance of the Court, My Lord, it says: "BATCo", at the bottom but it doesn't say who 10 organized it. It says: "*BATCo document for Legal Services: Health Canada*". It may well be a BATCo document but I wouldn't want the Court, by my silence, to interpret that I'm missing what it is.

THE COURT: 15

But am I wrong, the witness said that it was organized, as a matter of fact, by BAT or?

Me SIMON POTTER:

No, he's assuming it...

THE COURT: 20

No?

Me SIMON POTTER:

... from the BATCo at the bottom of the document.

THE COURT:

18 Q- I see. So, you don't know who was the organizer.

A- I remember this seminar, it might well have been organized by a professional seminar company or it could have been organized by the BAT company itself. So, it was a long time ago and my memory of it is very 5 indistinct. I'm pretty sure it was at a country house somewhere and I drove up, gave my speech and drove away again.

Me MAURICE REGNIER:

19 Q- Well, maybe to refresh your memory, sir, at page 2213 10 of your testimony in the first trial, volume 15, you said:

"I've been to tobacco companies, I've spoken to tobacco company seminars, I've spoken to and indeed been paid 15 for a seminar at British American tobacco for talking about how advertising works".

Could this be the seminar to which you were referring to at the time? 20

A- Quite clearly, it almost certainly was. The previous trial was around that same time. So, my memory would have been a good deal clearer of it.

20 Q- Now, we see, just under your name, the name of Mr. Paul

MICHAEL JOHN WATERSON (EXPERT)
PLAINTIFFS
CROSS-EXAMINATION

Bingham. Do you know who Mr. Paul Bingham is or was at the time, for BAT?

A- I know the name but I can't remember his function at all, I'm afraid. I have a very... I possibly met Mr. Bingham once or twice but I would not claim, in any sense, a close connection with him at all. 5

21 Q- If I'm to suggest that Mr. Bingham was director of the Marketing Department for BAT, would that be possible?

A- It would be possible but again, I really can't say, I don't remember. 10

22 Q- So, I would like to file this exhibit, My Lord, as D-?

THE CLERK:

D-41.

Me MAURICE REGNIER: 15

23 Q- Now, have you ever done any work for a United States based organization called the Tobacco Institute?

A- That, I can't remember. I know the name very well, obviously. I believe I visited the Tobacco Institute in the company of a gentleman from the European Association of Advertising Agencies many, many years ago, perhaps twenty (20) years ago and it's conceivable I testified on their behalf but I think it's unlikely, but I really can't remember. 20

24 Q- Would you please tell the Court what is, to your 25

knowledge, what is or was the Tobacco Institute?

A- I believe the Tobacco Institute was some form of trade association of tobacco companies.

25 Q- I'm showing you, sir, a memorandum from the Tobacco Institute, dated May five (5), nineteen eighty-seven 5 (1987). If you turn to page... the bottom of this document, page 348180, the first paragraph reads as:

"A variety of Tobacco Institute consultants have been and will continue to be used as witnesses and media spokesmen by the above coalitions". 10

And the third paragraph says:

"Marketing experts such as Roger Blackwell, Scott Ward and Jean Boddewyn... - or Jim Boddewyn, I don't know - ... and Michael Waterson, research director of Advertising Association of Great Britain". 15

Would you please tell the Court to which extent 20 you were used as a witness and a media spokesman for the Tobacco Institute?

A- I don't think I ever, I could be wrong but, I don't believe I ever was used as a spokesman directly by the

Tobacco Institute. The paragraph refers to marketing experts have been used... Just a moment.

"A variety of Tobacco Institute consultants have been and will continue to be used as witnesses and media by the above coalitions".

5

I don't believe I really... this is a long time ago, I don't believe I have ever been used directly. I do believe and know, in fact, I have been used as an expert witness by the four (4) As, that is what is 10 mentioned on the previous page, at the top. That is the American Association of Advertising Agencies. The AAF, which I believe is the American Advertising Federation; and the ANA which is the Association of National Advertisers; and the MPA, which I believe is 15 the Magazine Publishers Association. I remember very well working for these people.

I don't remember working for the Tobacco Institute. If I did do any work for them, it must have been exceedingly limited and it must have been a great 20 deal of time ago... a long time ago. I certainly haven't worked for them for many years, if ever.

26 Q- If you look at the very first paragraph of this memorandum, first page, sir, the memo starts by saying

that,

"As discussed at our last meeting, we are not at all encouraged by reports of the advertising ban facing the industry in Canada. It is our expectation that the Canadian situation will worsen our legislative challenge here. While we do not generally use our resources to deal with matters outside of the U.S., if any of you believe it would be helpful we are prepared to utilize some our capacity to assist the Canadian industry."

5

10

Were you ever privy to a discussion with members 15
of The Tobacco Institute on matters discussed in the...
mentioned in these two (2), very two (2) first
paragraphs?

A- No, never.

27 Q- I would like you to turn to the second page of this 20
document, last paragraph, which reads,

"Strategy and Programs. Overall, it is our strategy to position the advertising and publishing industries

in front of this issue."

Were you ever privy to discussions with the members of The Tobacco Institute on this, to the effect that the strategy of The Institute was to position the advertising and publishing industries in front of this 5
issue?

A- I don't remember any discussions at all with The Tobacco Institute and certainly not on this sort of issue at any time.

28 Q- So, My Lord, I would like to file this document 10
as D-42.

Me DOUGLAS MITCHELL,
on behalf of Plaintiff JTI-Macdonald:

My Lord, I will voice my objection...

LA COUR:

15

Un instant.

Me DOUGLAS MITCHELL:

... because I don't think the fact that the document mentions Mr. Waterson and is a third-party document to which Mr. Waterson has testified, "I have 20
no recollection of either the two (2) paragraphs read," I don't think it's proper to file a document from a third party for that purpose.

THE COURT:

Under reserve.

Me MAURICE REGNIER:

29 Q- Are you familiar, sir, with an organization named
Infotab?

A- Yes.

5

30 Q- Would you please describe...

THE COURT:

I'm sorry, what's the name?

Me MAURICE REGNIER:

Infotab, I-N-F-O-T-A-B.

10

THE COURT:

Uh-huh.

Me MAURICE REGNIER:

31 Q- Would you please describe to the Court, to the best of
your knowledge, what is Infotab?

15

A- I don't believe Infotab exists any more, but it used to
be... it was called... it was an abbreviation for
Information Tobacco. It was a documentary centre
put... used by the tobacco companies and, at one stage
I believe, by anyone else that wanted information on 20
tobacco, and it was... I believe, I don't know because
I never saw the full resources there, but it was a
place I used to go to if I wanted to find a statistic
relating to the tobacco industry or if I wanted to find
a paper that had been published in relation to the 25

tobacco industry. It was, as far as I was aware, simply an information centre in exactly the same way the Advertising Association possesses a library of information about advertising matters.

32 Q- And apart from visiting the library, did you have any 5
other kind of relationship with Infotab?

A- I had no... I believe I only ever visited Infotab once in my life. I remember the occasion because I was surprised to find they were in Kew, which is a suburb of London, and not in the centre of London, and aside 10
from a few occasions requesting statistics, I had no contact with them of any description.

33 Q- Would that be near the Gardens?

A- I'm sorry?

34 Q- Near the Garden in Kew? 15

A- Kew is a very small place and so it's... almost anywhere in Kew is near the Gardens.

35 Q- I'm showing you, sir, a document coming from Infotab. So you mentioned that this was a tobacco industry founded company, am I correct? 20

A- That was my understanding.

36 Q- If you go at page... well, first of all, this document is entitled "*A general briefing on Infotab*". If you go at page 2 of this document...

THE COURT:

Which is curiously after 4.

Me MAURICE REGNIER:

That's the way the photocopies came out...

THE COURT:

5

Uh-huh.

Me MAURICE REGNIER:

... Your Lordship.

A- Page 2.

37 Q- Yes, page 2.

10

THE COURT:

Second page 2.

Me MAURICE REGNIER:

38 Q- It's numbered 2 at the top of the page.

THE COURT:

15

"Membership".

A- I've got a page 2 which got reference material.

39 Q- Try another one.

A- Okay.

Me MAURICE REGNIER:

20

40 Q- We see that there are six (6) founding members. Would you please describe to the Court who are, to your knowledge, these six (6) founding members?

A- BAT, Imperial and Philip Morris, and the Reynolds and

Rothmans are obviously tobacco companies. I believe that *Reemtema*, I'm not sure how you pronounce it, is some sort of a continental tobacco company, but I couldn't be sure.

Me SIMON POTTER:

5

For the assistance of the Court, My Lord, Reemtsma is a German tobacco company.

Me MAURICE REGNIER:

41 Q- I would like you to turn to page 12 of this document, paragraph 43, which reads,

10

"Infotab also encouraged M.J. Waterson of the UK Advertising Association, Director of Research, to publish as a booklet the highly successful presentation given to the Council of Europe, Health Division, and a number of other distinguished bodies, called "Advertising, Brands and Markets". This is now available and is a sound edition to the literature."

15

20

Would you please describe to the Court what kind of encouragement you received from Infotab?

A- I haven't the faintest idea, I have no memory whatsoever of being encouraged by Infotab.

Advertising, Brands and Market was a booklet produced exclusively for the Advertising Association. It is true it was very successful because it covered the literature relating to the relationship between advertising brands and total market in a way that I 5 don't think any other booklet had previously, but it was in no sense a booklet to encourage... protecting or defending tobacco advertising. It was a very general book, and I don't believe that Infotab had anything to do with it. I certainly can't imagine that they had 10 any role in pushing the Advertising Association to produce this thing. We knew from the original research into it that it was a subject in which the advertising industry as a whole was very interested. It was particularly important because of the intensity of the 15 drink, the alcohol debate at the time, and although I can see its application in other areas, in food, in tobacco, and so on, I don't believe that Infotab had any significant influence or... I don't believe they influenced the contents in any sense whatsoever, and I 20 have no memory whatsoever of them as they say "encouraging" me to publish it, and I find it very difficult to believe simply because it was an advertising association publication, so nothing to do

with Infotab.

42 Q- Are you the author of this...

A- I am the author of *Advertising, Brands and Market*, yes.

43 Q- Paragraph 41, under the title "*Marketing Freedoms*", it
says that:

5

*"Products now available to members
include the original CATAC kit in
English; 'Tobacco and Advertising:
five Arguments against Censorship'..."*

Then another document.

10

*"... 'Tobacco advertising bans and
consumption in 16 countries', edited
by Professor Boddewyn..."*

Are you familiar with this work?

A- The Boddewyn work?

15

44 Q- Yes.

A- I believe that I have seen it, yes.

45 Q- Do you know Mr. Boddewyn?

A- I have met him maybe once or twice, but I haven't seen
him for ten (10) or fifteen (15)... many years, anyway, 20
in my memory. I have met him at the very most a
handful of times, and possibly once or twice. He's
American and I have never seen him in his place of
work. I believe he visited the Advertising Association

on one (1) occasion, or perhaps more.

46 Q- I would like to file this document, My Lord, as
Exhibit D-43.

Me DOUGLAS MITCHELL:

That one is clearly... I mean, Mr. Waterson says, 5
the one paragraph that was read to him, he says it's
not true. So, now we have a document from a third
party that has clearly, I mean, no pertinence
whatsoever.

THE COURT:

10

Maître Régnier?

Me MAURICE REGNIER:

Votre Seigneurie, c'est pour établir
l'objectivité du témoin. Nous avons des documents qui
font état de relations entre le témoin et l'industrie 15
du tabac. C'est à ce niveau-là, ce n'est pas pour...
il n'y a personne qui va envoyer monsieur Waterson en
prison pour ça. C'est simplement pour établir la
nature des liens, apparents ou autres, de monsieur
Waterson avec l'industrie du tabac. 20

LA COUR:

Oui, mais là, il y a un problème. Vous avez
référé au paragraphe 43 où, carrément, quelqu'un à
Infotab se vante d'avoir encouragé la publication d'un
document dont monsieur Waterson nous dit qu'il n'a 25

jamais été encouragé, qu'il n'a rien à voir avec ça,
qu'il l'a fait en...

Me MAURICE REGNIER:

Alors, Votre Seigneurie, la Cour appréciera qui,
du document qui est là ou de monsieur Waterson, dit 5
vrai. C'est tout. C'est une question simplement de
poids. C'est une question de poids, de crédibilité.

LA COUR:

L'objection est maintenue. Maintenant, encore
une fois, sous réserve de faire venir quelqu'un, là, 10
qui sera la personne autorisée, il viendra nous dire
peut-être que monsieur Waterson a reçu une subvention
pour publier ça de la part d'Infotab et, à ce moment-
là, j'apprécierai.

Me MAURICE REGNIER:

15

Très bien, Votre Seigneurie. Je retiens les
suggestions de la Cour.

LA COUR:

Non non, ça, ce serait tout à fait légal, quant
à moi, et ça minerait sans doute la crédibilité du 20
témoin.

Me MAURICE REGNIER:

Vous avez tout à fait raison.

LA COUR:

C'est ma force. Jusqu'au jugement de la Cour 25

d'appel et éventuellement celui de la Cour suprême,
comme on l'a vu dans le premier dossier.

Me MAURICE REGNIER:

47 Q- Within the Advertising Association, sir, was there
anything such as a Tobacco Advertising Working Party⁵?

A- The Advertising Association, at one point in time or
another, had working parties on most of the subjects of
importance in relation to advertising sectors. So
there was a food working party, a drink working party,
a pharmaceuticals working party, and in need at one ¹⁰
time or another, working parties on most of the
subjects that the Advertising Association had in one
form or other to deal with. I believe there was a
tobacco working party, although many years ago. I
don't believe... 15

48 Q- How many years ago, sir?

A- I'm afraid I can't help you there. But there certainly
hasn't been a recent meeting of anything like that, I
don't think.

49 Q- I will try to help you. So I'm showing the Court ²⁰
minutes of a meeting of the Tobacco Advertising Working
Party dated twenty-six (26) January nineteen ninety-
five (1995). We see that there were some people
present at this meeting. Would you please identify to
the Court, to the best of your knowledge, which of ²⁵

these people come or are members or linked to the tobacco industry?

A- Clearly, the gentleman that works for Gallaher works for a tobacco company, and similarly with Rothmans. TMA, I think, stands for Tobacco Manufacturers Association, so the two (2) people at the bottom of the list would obviously be. Newspaper Society is about newspapers. PTA is a periodicals publishing association. BTA, British Transport Advertising perhaps. Possibly British Transport Advertising. And Leo Burnett is an advertising agency. And the AA stands for Advertising Association. 5 10

So, as far as I could see, four (4) people on that list directly employed by tobacco companies in one way or another. 15

50 Q- I'm sorry, sir, did you mention the Harriet Bryan from BAT? In the apologies, first paragraph.

A- Oh, I didn't see the apologies, I'm afraid. Yes, Harriet Bryan, BAT, indeed.

51 Q- Second paragraph refers to the minutes of the last meeting held on the twenty-seventh (27th) of September nineteen ninety-four (1994). Second sentence says: 20

"After a lengthy discussion it was agreed to continue to informally

*educate agencies, the media, key civil
servants and 'uncertain' Labour MPs,
on the case for tobacco advertising,
using proven research, the
Government's rebuttal of Smee, and any
new information as it appears."*

5

Would you please tell us what's the meaning of
"to informally educate agencies"?

A- I don't...

Me SIMON POTTER:

10

Excuse me, My Lord. I'm very sorry, we're asking
the witness now to interpret the words used in the
minutes of a meeting which he personally never
attended, and minutes not written by him. It is
clearly an illegal question.

15

THE COURT:

Maître Régnier?

Me MAURICE REGNIER:

52 Q- Are you aware, sir, of the nature of any informal...
are you aware whether the Advertising Association made 20
any efforts to informally educate agencies, media, key
civil servants and uncertain Labour MP's in the case of
tobacco advertising, for example?

A- I suppose to... it would mean... I mean, I can only

speculate, obviously, because I wasn't there and didn't write this, but I would imagine that it meant to provide them with information about the advertising industry in relation to tobacco. But I can only guess, I'm afraid.

5

53 Q- Would you please explain to the Court the extent of the Advertising Association in formal activities on the case of tobacco advertising?

A- I don't believe the Advertising Association has done any work on tobacco advertising for several and perhaps 10 many years. I don't believe that the Advertising Association, at least for three (3) or four (4) years, has had anything to do with the tobacco debates at all. Prior to that, tobacco advertising accounts for a tiny fraction of all advertising. I think it accounts for 15 something like one percent (1%) of advertising expenditures, possibly more but not a lot more.

The Advertising Association is there to represent the entirety of the advertising industry and has never, to my knowledge, diverted more than a tiny fraction of 20 its resources to the tobacco debates, to the tobacco advertising issues, except that insofar as it relates to defending the advertising industry as a whole.

So, for example, I was asked to produce a literature search on tobacco and tobacco advertising, 25

and drink advertising, and food advertising because it was felt that the arguments and the literature that I was putting together would relate to a much wider aspect of advertising industry affairs than simply the industries that they were relating to. 5

So, for example, if I could show or showed that advertising was not related to total consumption, those arguments would be useful in a much broader perspective. I don't believe the Advertising Association either ever had the resources, I would 10 stress it's a tiny organization diverted to the entirety of the industry, the media corporations, the advertising agencies and the advertisers. And no one, none of the council members would allow the Advertising Association to spend more than a tiny... more than an 15 appropriate fraction of its endeavours on a sector, a specific sector of advertising accounting for a tiny fraction of the total. It simply wouldn't have been allowed to happen.

So, to answer your question, I think the work 20 that the Advertising Association has done on tobacco has necessarily been very limited in relation to its overall activities, which, themselves, are very small...

54 Q- The work referred to it, the very last paragraph of the 25

first page, is it co-edited with Mr. John Luik?

A- I'm sorry, where is this?

55 Q- The last paragraph, it says:

"Mike Waterson is currently
undertaking the review of literature
on tobacco advertising and
consumption, to be published later in
the year".

5

Is that a reference to the book that you
published with Mr. John Luik?

10

A- I can't see that paragraph. Where we...

56 Q- The very first page, last paragraph, sir.

A- I don't think it mentions John Luik.

57 Q- No, it doesn't, that's why I'm asking you the question.

A- I don't think I co-edited a book with John Luik, called 15
"Advertising and Markets". Whether that is the same
but that was never a review of the literature, that was
simply a collection of papers published in the
International Journal of Advertising, which is an
advertising association journal. And John Luik and I 20
sat down for about two (2) hours and went through the
International Journal of Advertising back copies and
selected those papers that we thought were most
suitable. So, that's the extent of my contact with

John Luik on that book. And I suspect that this is simply something that I was undertaking on my own, I don't believe... It could be the same thing but I think it's unlikely.

58 Q- Well, in nineteen eighty-five (1985), sir, how many 5
books have you published on the issue of literature on tobacco advertising and consumption?

A- Well, the *Advertising and Markets* book was not on Tobacco, it was simply a collection of papers relating to the impact of advertising on market size, some of 10
which, a significant proportion of which related to tobacco, a significant proportion of which related to drink and a significant proportion of which related to the impact of advertising in general on markets not specified. 15

It could have been but I simply can't. But on the other hand, it's entirely possible that the Advertising Association asked me to look at recent literature on tobacco advertising and consumption separately. I simply wouldn't know and I couldn't 20
state with any certainty whatsoever.

59 Q- I'd like, My Lord, to file this document as D-43?

LA GREFFIERE:

43.

Me SIMON POTTER:

My Lord, for the same reasons as invoked before,
this is a document which simply mentions Mr. Waterson.
Now, there may be thousands and thousands of documents
out there which happen to mention Mr. Waterson but 5
that's all it does. It's hardly useful.

THE COURT:

Considering the answers of the witness, I'll take
the objection under reserve and we may file it.

Me MAURICE REGNIER:

10

60 Q- Now, sir, are you aware of the fact that Mr. John Luik
testified before the Canadian Standing Senate Committee
on Legal and Constitutional Affairs while this
committee was studying the *Bill C-71*, the *Tobacco Act*
which is presently challenged, are you aware of that? 15

A- I don't think, I know very little about Mr. Luik and I
don't know, I don't believe I have been aware of any
specific activities that he's undertaken. It's
possible I've come across documentation that showed
that but I have no memory of it whatsoever. 20

61 Q- Well, sir, my question was a little bit more specific.
Were you ever invited by the... to attend, to appear
before the Standing Senate Committee on Legal and
Constitutional Affairs in nineteen ninety-seven (1997)?

A- This is the precursor of this one, are we talking about? Sorry, I'm not...

62 Q- Well, let me show you a document which is an excerpt from the proceedings of this committee, this will maybe help you.

5

Me SIMON POTTER:

My Lord, might I say that I've just suddenly noticed that the documents being showed to the witness are marked, highlighted, whereas the documents being showed to the lawyers are not. I don't... it hasn't 10 caused a problem so far but it is so that we are not getting the same stuff that is going to the witness.

THE COURT:

Be careful, Maître Régnier.

Me MAURICE REGNIER:

15

Oui, Votre Seigneurie, c'est parce que vous comprendrez que ce n'est pas par mauvaise volonté mais le temps me manque un peu, c'est beaucoup de travail le soir quand on revient. Et si j'avais le temps de faire les choses à la perfection, je les ferais. Alors, ce 20 n'est vraiment pas pour... Je vais essayer de faire du mieux que je peux, Votre Seigneurie.

LA COUR:

Bien.

Me MAURICE REGNIER:

25

63 Q- Now, it says, Mr. Luik says at the fourth paragraph of this document, in his appearance, the very last sentence, he says:

"In some sense, the submission is a joint one, although Professor Waterson is unable to be here today".

5

Do you recall having been invited to attend, or to appear before this session of the Standing Senate Committee on Legal and Constitutional Affairs?

A- I have no memory of being invited to it but I am 10 invited to a lot of things that I turn down, so, it is possible but I have no memory whatsoever of being invited to this one.

64 Q- Now, the sixth (6th) paragraph reads,

"I should like to say something briefly something about the work that Mr. Waterson and I have done over the last 10 years on the issue of advertising in general and, more particularly, the issue of tobacco advertising. This work has been published in a number of academic journals. It is most conveniently brought together in a book which we

15

20

published last year in the United Kingdom, called Advertising and Markets, copies of which will be provided to you."

Now, Mr. Luik seems to express the scope of your 5
relationship in maybe broader terms than yours.

Me SIMON POTTER:

Objection, My Lord, that is a clear misreading of
this document, that is a misstatement.

Me MAURICE REGNIER:

10

65 Q- Do you agree with the statement of Mr. Luik that you
have done work with him over the last ten (10) years on
issue of advertising?

Me SIMON POTTER:

That is not what the document says, My Lord. 15

THE COURT:

66 Q- Do you have something to say about the sixth paragraph,
sir?

A- I'd very much like to say something about both fourth
paragraph and the sixth paragraph, My Lord, if I may. 20.

67 Q- Yes.

A- The highlighted bit on paragraph 4, contains two (2)
demonstrably false points. I'm not a professor and
never have been, I don't know where he got that from.

And in no sense that I can imagine was the submission a joint one. I don't believe I was ever asked to submit anything, I'm sure I didn't submit anything, and I think it most unlikely that I would have ever made a joint submission with Dr. John Luik. So I can't 5 understand where that reference came from at all other than the fact he may have been trying to increase his own credibility by associating himself with me, but I certainly have no long-term association with Dr. John Luik, and I certainly would not have and did not make 10 any kind of joint submission.

He does say "*in some sense*", whatever... I can only presume he's referring to the fact that I did select a series of articles together in one (1) book with him, and that if he was introducing that book, he 15 could, I suppose, suggest that in some senses he was giving my views as well as his on what was appropriate literature. But to suggest I was unable to be there or that I'm a professor is clearly wrong.

In relation to the sixth paragraph, the first 20 point that he makes is utterly misleading unless it's read as that he has done some work over the past ten (10) years and I have done some work over the past ten (10) years, and in that sense, it's perfectly true.

But it is quite untrue to say that I have been working with him for ten (10) years. There's a very great distinction between the way one can read that first sentence, and it is only true if he is simply referring to the work he has done quite separately from me and 5 the work that I have done quite separately from him.

I don't believe that the work that we did together lasted for more than a few hours at the absolute most, and as I've already described, consisted in sitting down at the request of the Advertising 10 Association to select articles to put into a book called... I believe it was called *Advertising and Markets*.

So I do believe that the outlined... the highlighted elements here could be read in a very very 15 misleading way, and indeed demonstrably false in one respect, I am not and have never been a professor.

Me MAURICE REGNIER:

68 Q- I would like you to turn to the third page of these proceedings of the Senate Committee, the second to last 20 paragraph, which reads,

"Approximately three years ago, Mr. Waterson and I did a detailed analysis about the Smee Report which has

*appeared in three reviewed articles
and journals."*

Is that true?

A- I did a review of the Smee Report and I believe he did
a review of the Smee Report, but I certainly didn't sit 5
down with him and go through the Smee Report. I
believe he's referring to the work we did in exactly
the same way he is referring to the work in paragraph
6, the work that we did separately.

A number of critiques of the Smee Report were 10
pulled together by various people because so much...
there were so many references which were clearly wrong
in the Smee Report and I believe that my work may well
have appeared in documents which pulled together
different critiques, but I certainly have no memory... 15
I don't believe I did ever sit down with him and
analyze Smee together.

It's conceivable my memory is utterly at fault
but I'd be surprised.

69 Q- My Lord, I would like to file this *Excerpt from* 20
the... - may I finish, Maître Potter? - ... Excerpt
from the Proceedings of the Standing Senate
Committee...

LA COUR:

J'ai tendance à accueillir votre objection. Le
seul problème, c'est que monsieur Luik sera un témoin?
Me MAURICE REGNIER:

Oui.

LA COUR:

5

Il faudrait garder ça sous la main à un moment
donné. Visiblement, il y aura une question de
crédibilité là-dessus. Pour l'instant, ce n'est
certainement pas pertinent de le déposer. L'objection
est maintenue.

10

Me MAURICE REGNIER:

Votre Seigneurie, est-ce que vous permettez que
j'argumente? Vous avez rendu votre décision, mais je
vais vous expliquer quand même.

LA COUR:

15

Je suis prêt.

Me MAURICE REGNIER:

C'est que c'est un document qui...

LA COUR:

Troublez-moi si vous voulez, je vais... si je me 20
suis trompé, je vais me reprendre. Vous avez raison,
j'aurais dû... comme d'ailleurs, maître Desrosiers, si
vous voulez... je vous oublie de temps en temps, comme
vous voyez. C'est la passion du moment.

Me JULIE DESROSIERS:

25

Je vais vous rappeler si...

LA COUR:

Vous faites signe.

Me MAURICE REGNIER:

Les procédures, Votre Seigneurie, des comités 5
sénatoriaux et de la Chambre des Communes sont des
documents publics. Ce sont des exemples classiques de
preuve extrinsèque autrement, alors, ils font foi de ce
qui est écrit là-dessus. Evidemment, la valeur de la
preuve, là, est à la discrétion du Tribunal, mais je 10
dépose le document pour... il est là, le témoin a
témoigné là-dessus et ça ne veut pas dire que ce qui
est écrit là-dedans est vrai, monsieur a donné des
explications. Alors, vous comprendrez que, je pense,
c'était légitime de notre part de poser ces questions 15
pour établir la nature des relations...

LA COUR:

D'ailleurs, j'ai bien hâte d'entendre monsieur
Luik quand il viendra. Je sens que votre collègue
brûle de l'interroger sur ça. 20

Me MAURICE REGNIER:

Alors, Votre Seigneurie, c'est à cet égard-là, je
pense que ces documents-là ont été déposés
d'ailleurs... tous les documents qui provenaient des
comités sénatoriaux et de la Chambre des Communes dans 25

le premier dossier ont été déposés comme preuve
extrinsèque.

LA COUR:

Simplement que de le déposer avec ce témoin-là,
ça laisse une impression que je n'aime pas beaucoup. 5
Est-ce qu'il y a quelqu'un d'autre qui pourrait le
déposer à un moment donné? Ou si... maître Potter, de
toute façon, il y aura en quelque part, mais ça, je...
est-ce que vous avez objection à ce qu'on réfère à ça
en plaidoirie à tout événement? 10

Me SIMON POTTER:

A ce document-là, oui...

LA COUR:

A tous les documents...

Me SIMON POTTER: 15

... parce que ce n'est pas un document officiel,
ça ne sort pas de *Hansard*.

Me MAURICE REGNIER:

Très bien, maître Potter.

Me SIMON POTTER: 20

C'est un extrait.

Me MAURICE REGNIER:

Alors...

Me SIMON POTTER:

Ça ne porte pas de date.

Me MAURICE REGNIER:

Votre Seigneurie, je déposerai, Votre Seigneurie.

LA COUR:

Bien.

5

Me MAURICE REGNIER:

Alors, je vais déposer la version officielle de
l'ensemble, ça fait partie de notre Règle 15 de toute
façon, ça a été indiqué comme avis de preuve
extrinsèque.

10

LA COUR:

Pour l'heure, objection maintenue.

Me MAURICE REGNIER:

Il n'y a pas de problème là-dessus.

LA COUR:

15

Très bien.

Me DOUGLAS MITCHELL:

Monsieur le Juge...

LA COUR:

Oui, maître Mitchell, vous vouliez... vous n'êtes
pas d'accord avec...

20

Me DOUGLAS MITCHELL:

Mon position diffère légèrement de celle de
monsieur Potter.

LA COUR:

25

Oui, bien sûr.

Me DOUGLAS MITCHELL:

Juste pour que ça soit clair. Moi, je n'ai pas
d'objection à ce que les documents qui ont été devant
les comités parlementaires soient déposés comme preuve 5
extrinsèque, mais je ne pense pas que c'est approprié
de le déposer avec ce témoin.

LA COUR:

Je pense qu'on semble s'entendre, à moins que
maître Potter ait des objections là-dessus, qu'un jour 10
tout le document sera déposé.

Me MAURICE REGNIER:

C'est parce que le problème, vous comprendrez,
c'est un bel exemple de preuve extrinsèque, qui est le
témoin approprié pour déposer ces... c'est sûr. 15

LA COUR:

Mais je ne crois pas, maître, que vous vous
opposiez à ce que le document en entier soit déposé,
est-ce que je me trompe?

Me SIMON POTTER:

20

Je ne m'oppose pas à ce que le document paraisse
comme annexe, éventuellement, un argument éventuel, si
c'était un document officiel, mais de le déposer, comme
vous dites, il me semble, comme preuve avec ce témoin,
non. 25

LA COUR:

Très bien, on s'entend.

Me MAURICE REGNIER:

Je voulais le faire simplement pour une question
d'intelligibilité des témoignages, Votre Seigneurie, 5
c'est sans autre conséquence.

LA COUR:

Je suis content de l'avoir vu et quand monsieur
Luik viendra témoigner, probablement qu'il y aura 10
quelques questions qu'on pourra lui poser.
Visiblement, le témoin ne veut pas être associé à
monsieur Luik, c'est obvious.

Me MAURICE REGNIER:

70 Q- I'm showing you, sir, a memorandum from Rothmans 15
International, dated twenty-two (22) June nineteen
ninety-four (1994).

Alors, je vais garder les copies qui ne seront
pas soulignées, qui sont soulignées et je vais donner
au témoin les copies qui ne sont pas soulignées. 20

Now, this progress note dated twenty-two (22)
June nineteen ninety-four (1994):

"Canada. John Luik confirms the
following: There are two (2)

*government studies being undertaken:
Health and Welfare Canada for the
Federal Minister of Health. There is
no further information on terms of
reference and Health & Welfare Canada
is 'unforthcoming'. The industry has
filed a freedom of information request
but it is understood that this is
unlikely to be processed before the
research is published".*

5

10

The second paragraph, sir:

"Authors and Contributors

*Dr. Luik has begun contacting
potential contributors. Please let me
have any further suggestions as soon
as possible".*

15

My question is: Do you have any idea... have you
ever been contacted by Mr. Luik to be a potential
contributor to every work to be conducted by Mr. Luik.

A- I don't think so, I must restate that my contacts with 20
John Luik have been extremely infrequent and extremely
little, very, very, very brief. I don't know a major
work with him, as far as I remember, at all and I don't
remember him ever asking me to undertake some writing

or anything of that kind.

71 Q- Now, if you turn to the second page, the fourth paragraph, it says:

"Lawyers

*The Canadian lawyers have been asked
to undertake clearance of any authors
and manuscripts".*

5

Have any of your works, sir, presentations, speeches, books of every kind been, as it says, cleared by any Canadian lawyers, to your knowledge?

10

A- I don't believe so, I, obviously, in relation to this particular trial and the one thirteen (13) years ago, I've been involved with Canadian lawyers but I don't believe, I can't remember any other contact with Canadian lawyers in relation to papers that I've 15 written at all.

72 Q- Do you know whether or not any of your papers were submitted to Canadian lawyers for clearance?

A- Unless I have a memory of it, I don't think, My Lord, I can have a memory. I don't have a memory of any of 20 these things happening and I don't believe I have any... any knowledge. It's conceivable that something like that happened without my knowledge, obviously, but then I wouldn't know about it. And it's also

conceivable that I forgot, but it must have been a great long time ago and I simply have no memory whatsoever of anything of that sort. I don't think I would have very much liked having my work cleared by lawyers. Most of all I've written is about advertising industry and although there are several areas, a significant number of lawyers who have learnt quite a lot about the advertising industry, I don't think they would have been competent to judge my work and I don't think I would have wished them to judge my work. 10

73 Q- Did you prepare a written text when you appeared before the House of Commons Committee in nineteen eighty-seven (1987)?

A- I believe I had a written text, yes.

74 Q- Was that written text, in any manner, reviewed, cleared 15 or submitted to Canadian lawyers?

A- I simply have no memory. It was thirteen (13)... how long ago was it? Fifteen (15) or sixteen (16) years ago, and I simply can't remember. I believe I was working with the Canadian Advertising body rather than 20 with tobacco lawyers. In any event, I don't believe that it was... again, I could be wrong, fifteen (15) years is a long time, but I believe I was working, I do remember visiting the Canadian Association involved, the Canadian Advertisers Association, but not either 25

lawyers, offices or tobacco agencies, in any sense.

75 Q- Well, My Lord, I would like to file this document
as Exhibit D-?

THE CLERK:

44.

5

Me MAURICE REGNIER:

44.

LA COUR:

Pour quel motif, maître?

Me MAURICE REGNIER:

10

Votre Seigneurie, c'est un document sur lequel le
témoin a été interrogé et à l'égard duquel il a
répondu. C'est pour l'intelligibilité de la
transcription et du dossier.

LA COUR:

15

L'objection est acceptée. Je ne permets pas la
publication du document... la...

Me MAURICE REGNIER:

C'est parce que je n'avais pas encore entendu
l'objection de maître Potter.

20

LA COUR:

Est-ce que vous vous opposez, maître Potter?

Me SIMON POTTER:

Certainement.

LA COUR:

25

L'objection est maintenue. Merci, madame,
voulez-vous remettre... A moins que vous ayez quelque
chose à ajouter comme objection, non, ça va?

Me SIMON POTTER:

Oubliez ce que j'avais dit.

5

LA COUR:

Changé d'idée. Le procès est agréable jusqu'ici,
il faut admettre, ça va bien.

Me MAURICE REGNIER:

Absolument, absolument.

10

LA COUR:

Il faut le souligner quand ça arrive. Il y aura
probablement des moments plus tristes. Alors, ça va
bien.

Me MAURICE REGNIER:

15

Je n'ai aucune rancœur personnelle à l'égard des
décisions du Tribunal, ça va très bien.

LA COUR:

La Cour apprécie.

Me MAURICE REGNIER:

20

Puis parce que, là, c'est à mon tour mais...

LA COUR:

Ah! faites-vous-en pas.

Me MAURICE REGNIER:

Exactement, exactement.

25

LA COUR:

Mais j'essaie, d'ailleurs, d'équilibrer, vous
allez voir, cinquante-cinquante (50-50).

Me MAURICE REGNIER:

J'apprécie, Votre Seigneurie, j'apprécie. On 5
pourra en tenir compte, faire un calcul.

LA COUR:

Si j'en vois un plaider ça devant la Cour
d'appel, une remarque comme celle-là!

Me MAURICE REGNIER:

10

76 Q- Are there any reasons, sir, why you want to keep your
distance from Mr. John Luik?

A- I don't think so, he lives a long way away, I believe
he lives in Canada. So there's already a significant
distance between us. But I don't think there is any 15
other reason. We might simply have not had very much
contact with him. He is one of the number of people
who have been written about advertising and tobacco
products, but there are many people as well.

77 Q- Are you aware, sir, of the article published in the 20
Gazette, the Montreal Gazette, on June twenty-first
(21st), two thousand and one (2001)? I'll show you a
copy of it.

Me SIMON POTTER:

Alors, vous retirez l'affaire *highlightée* là.

Me MAURICE REGNIER:

Oui, ça va me faire plaisir...

Me SIMON POTTER:

Bon, alors, Votre Seigneurie, moi, j'aimerais 5
m'objecter même avant qu'il y ait des question posées
avec ce document en main. Ce qui se passe, là,
maintenant, dans un article qui ne mentionne même pas
monsieur Waterson, dans un article qui n'est pas très
flatteur envers monsieur Waterson, maître Régnier va 10
s'amuser à citer de la chose sur une transcription qui
sera publique pour dire des choses sur monsieur Luik,
qui n'est pas ici, mais qui est dans la liste de
témoins annoncée par le procureur général. Alors, moi,
je me lève, pas parce que le document est illégal en 15
lui-même, bien qu'il ne pourra jamais être lu par
monsieur Waterson, mais je me lève parce que c'est
purements injuste de faire cela à quelqu'un qui viendra
plus tard témoigner. Mais de laisser traîner dans une
transcription, pendant des mois, des choses qui sont 20
dites à son égard.

LA COUR:

Où allez-vous, maître Régnier?

Me MAURICE REGNIER:

Votre Seigneurie, la Cour a constaté fort à propos que le témoin veut garder ses distances et, avant même quelques questions, il était manifeste qu'il voulait garder ses distances avec monsieur John Luik. Alors, la question que je vais poser et je n'ai pas 5 besoin de l'article, s'il le connaît, il ne le connaît pas, s'il ne le connaît pas, je vais le retirer immédiatement. Mais les questions que je vais poser concernent s'il est au courant du contenu et ça sera oui ou ça sera non, ça finit là. Ce n'est pas plus 10 grave que ça, Votre Seigneurie, et ça éclairera la Cour peut-être à l'égard des réponses et du comportement du témoin qui, manifestement, avait des réticences manifestes lorsqu'on parlait de monsieur Luik. Alors, peut-être que ça va éclairer le Tribunal là-dessus. Il 15 ne faut pas oublier, Votre Seigneurie...

LA COUR:

Vous pourriez poser des questions sans l'article, maître, parce que je comprends bien votre préoccupation et j'y suis sensible, mais je vais demander à monsieur 20 Waterson de remettre l'article et on posera des questions.

Me SIMON POTTER:

Je pourrais... et aussi, Votre Seigneurie, je ne pense pas que ce soit que ce soit le cas, le permettre, 25

au procureur général du Canada de poser des questions:
Est-ce que vous connaissez monsieur tel, tel? Est-ce
que vous avez entendu dire que telle et telle chose
aurait été dite sur lui? Ou est-ce que vous avez
entendu dire qu'il aurait fait ou n'a pas fait telle et 5
telle chose? Ce n'est pas comme ça qu'il faut
procéder, Votre Seigneurie.

Me MAURICE REGNIER:

Alors, quand on sera à Londres, vous aurez le
temps de m'expliquer mon métier, mais je pense que, 10
pour le moment, je pose les questions, c'est suite aux
réactions du témoin, ça m'apparaît, Votre Seigneurie,
tout à fait légitime dans un contre-interrogatoire.

LA COUR:

Sous réserve.

15

Me MAURICE REGNIER:

78 Q- Are you aware, sir, that Mr. John Luik was fired from
the Brock University in St. Catharines, Ontario, for
having lied on his resume?

A- Absolutely no idea of any of this at all. This is 20
totally news to me.

Me SIMON POTTER:

If it is.

Me MAURICE REGNIER:

I have no further question on this paper and I 25

will ask for... en principe, de le produire, Votre
Seigneurie.

LA COUR:

Est-ce vous demandez à le produire?

5

Me MAURICE REGNIER:

S'il vous plaît.

LA COUR:

Voulez-vous me dire pourquoi, en droit, vous
pourriez le produire?

10

Me MAURICE REGNIER:

Encore une fois, Votre Seigneurie, pour
l'intelligibilité du témoignage et la *compréhensibilité*
du dossier.

LA COUR:

15

Votre objection est maintenue, maître. Prenez
donc le document, madame, s'il vous plaît, et vous
pouvez le déposer de l'autre côté. Bien.

Me MAURICE REGNIER:

J'ai de la difficulté avec mon stagiaire.

20

LA COUR:

Ah, les jeunes aujourd'hui! Vous pourrez faire
ça avec maître Desrosiers pour la prochaine journée.

Me MAURICE REGNIER:

Il l'a.

LA COUR:

Il est de mauvaise foi.

Me MAURICE REGNIER:

5

79 Q- When we were reviewing, sir, together the document by
Infotab, which was not filed, you mentioned that you
were aware of a... you had knowledge of a work by
Boddewyn titled "*Tobacco Advertising Bans and
Consumption in 16 Countries*", that's correct? 10

A- I said I thought I had a memory of it, yes, that's
correct.

80 Q- Did you know that this paper from Mr. Boddewyn was in
fact ghost-written by Mr. Paul Bingham from British
American Tobacco? 15

A- I had no idea. I may have seen it. I certainly...
it's never been a bedside reading exactly and I had no
idea whether one person wrote it or another.

81 Q- So I would like to show you, sir, a document that has
been filed through Mr. Jean-Paul Blais' discovery, I 20
don't remember under which... *quelle cote*.

It was already filed in the record, My Lord.

It is document ITL-12...

LA COUR:

Peut-être que si j'en avais une copie, ça
pourrait aider. 124? ITL-124?

Me MAURICE REGNIER:

ITL-124. *ITL-124.* And...

Me SIMON POTTER:

5

Votre Seigneurie, je crains que le document que
je viens de recevoir est incomplet. Je vois qu'il y a
des tableaux, et j'ai une page qui porte une
numérotation qui semble ne suivre de nulle part.

Me MAURICE REGNIER:

10

Vous avez tout à fait raison. Et c'est dans cet
état-là, Votre Seigneurie, que ce document nous avait
été transmis par Imperial Tobacco. J'avais eu une
discussion avec l'associé de maître Potter là-dessus,
maître Bordan, lors de l'interrogatoire d'Imperial 15
Tobacco et c'est... effectivement, maître Bordan lui-
même ne comprenait pas qu'est-ce que cette page faisait
à l'intérieur. C'est un document tel quel, et vous
avez ma parole là-dessus, qui est dans l'état identique
où ITL nous l'avait remis et ça avait été discuté lors 20
de l'interrogatoire de Jean-Paul Blais. Cette
question-là, quant à moi, est tranchée depuis fort
longtemps.

Me SIMON POTTER:

Alors, je signale la chose et...

LA COUR:

Oui oui.

Me MAURICE REGNIER:

Vous avez fort raison. Vous avez fort bien 5
raison, c'est tout à fait... nous étions, nous aussi,
fort surpris de trouver cette page en plein milieu d'un
document qui manifestement n'a rien à voir avec le
reste de ce papier.

LA COUR:

10

Si vous vous entendez, vous l'enlèverez. Si vous
ne vous entendez pas, on va vivre avec. L'homme est
essentiellement adaptable, comme disait Marcuse.

Me MAURICE REGNIER:

82 Q- So I'm showing you, sir, the page which we were 15
referring to.

THE COURT:

What page is it?

Me MAURICE REGNIER:

C'est la page numérotée 18963 dans le coin 20
inférieur droit. C'est celle qui est comme un fax.

LA COUR:

Uh-huh. Oui.

Me MAURICE REGNIER:

83 Q- This document is signed by Mr. Paul Bingham. The third 25

paragraph reads:

*"You already have the IAA booklet by
Boddewyn, which I ghost-wrote for him
in nineteen eighty-six (1986).
Although I cannot update this for you
instantly, I give you incidence of
smoking numbers, as requested, for
some of the countries that had bans."*

5

Do you have any knowledge, in view of this
statement by Mr. Bingham, that Mr. Boddewyn's booklet
was ghost-written by Mr. Bingham?

10

Me SIMON POTTER:

Already asked, already answered.

Me MAURICE REGNIER:

No, but in view of this document, My Lord.

15

THE COURT:

84 Q- What's your answer?

A- My Lord, I have simply no... no knowledge of this at
all.

Me MAURICE REGNIER:

20

85 Q- And have...

Me DOUGLAS MITCHELL:

My Lord, may I interject and suggest that maybe
we could get on with the cross-examination of Mr.

Waterson rather than the cross-examination of people
that are not here?

Me MAURICE REGNIER:

86 Q- Have any of your works, sir, been in any manner ghost-
written by Mr. Bingham or anybody from British American 5
Tobacco?

A- No.

87 Q- Thank you.

I would like to file this document as D...

THE COURT:

10

Was it already filed or...

Me MAURICE REGNIER:

Yes, it's filed...

Me SIMON POTTER:

It was filed in a discovery, My Lord. It was 15
filed in a...

Me MAURICE REGNIER:

Which is...

Me SIMON POTTER:

It was filed during a discovery under une 20
ordonnance de confidentialité, pour des raisons
commerciales. Voici, on cherche à faire déposer ce
document-là le jour avant qu'il y aura un témoin devant
vous qui viendra d'Imperial Tobacco, alors que monsieur
Waterson nie le contenu de ce qu'il lit. 25

Me MAURICE REGNIER:

Votre Seigneurie, le document fait partie de la
preuve au dossier. Il a été déposé dans le cadre
des...

LA COUR:

5

On s'entend qu'il va être déposé? C'est ça que
je veux savoir, est-ce que c'est aujourd'hui ou plus
tard?

Me MAURICE REGNIER:

Bien, on est là, on en a discuté, Votre 10
Seigneurie. Alors, il n'y a aucun préjudice à la
partie demanderesse. Le document est au dossier
légalement.

LA COUR:

Maître Potter? Maître Mitchell?

15

Me DOUGLAS MITCHELL:

No, this is not the proper way of dealing with
expert witnesses. Expert witnesses are not here to
file documents generally from third parties. Expert
witnesses are asked to give their opinion and to be 20
cross-examined on their opinion, that's all.

LA COUR:

Ce n'est pas le bon moment, maître. Mettez ça
sur la glace. Redonnez ça pour qu'on... L'objection
est maintenue, pour l'heure.

25

88 Q- Again, sir, you realize that we were switching from French to English. So, I apologize if you don't understand everything, but the choice is the lawyers' choice.

R- Non non, je comprends. Je comprends beaucoup beaucoup. 5

Me MAURICE REGNIER:

Votre Seigneurie, j'en ai discuté ce matin avec maître Mitchell, on a fait référence à quelques reprises, même à plusieurs reprises, au témoignage de monsieur Waterson dans le premier dossier, dont les 10 volumes sont là contre le mur. Histoire de ne pas encombrer la Cour, je n'ai pas déposé tout le témoignage de monsieur Waterson, qui représente trois (3) volumes. J'aimerais quand même qu'on le cote, qu'on l'identifie pour fins d'identification, et je 15 remettrai à la Cour lundi les trois (3) volumes complets, la transcription complète.

LA COUR:

C'est de consentement, le dépôt? Alors, ça, ce sont les témoignages de monsieur Waterson devant le 20 comité du Sénat?

Me MAURICE REGNIER:

Non non non, devant cette Cour en mil neuf cent quatre-vingt-huit (1988)...

LA COUR:

25

Ah bon.

Me MAURICE REGNIER:

... quatre-vingt-neuf ('89).

LA COUR:

5

Objection, maître, non?

Me SIMON POTTER:

Non, je n'ai pas d'objection. Cependant, je pense que le moment est utile pour faire un commentaire. Le dossier, lorsqu'on est arrivés devant 10 la Cour d'appel la dernière fois, était énorme. Quand est venu le temps de faire le dossier conjoint et de décider ce qui serait dans l'autre dossier conjoint de cette Cour-là, il était impossible de s'entendre pour rapetisser ce dossier le moins possible. Alors, le 15 dossier conjoint de la Cour d'appel allait plusieurs fois de plancher à plafond.

Si, cette fois-ci, il faut que nous ayons un dossier conjoint qui a toutes les transcriptions dans cette cause, toutes les pièces dans cette cause et 20 toutes les transcriptions dans la dernière cause, ce sera tout à fait invivable.

Je n'ai aucune objection. Monsieur Waterson a témoigné, c'est très bien. Il témoignera comme ça deux (2) fois dans cette cause, comme la dernière fois et 25

comme cette fois-ci. Il n'y a pas de problème. Mais
ça devient...

LA COUR:

C'est un plaisir de le voir au Canada,
d'ailleurs.

5

Me SIMON POTTER:

C'est ça. Peut-être que la prochaine fois, il
n'aura pas besoin de revenir. On va pouvoir tout
simplement déposer deux (2) fois son témoignage.

LA COUR:

10

Ce sera peut-être ses enfants qui témoigneront
comme experts la prochaine fois.

Me SIMON POTTER:

Et les miens qui plaideront.

LA COUR:

15

Et j'ai un fils avocat qui sera peut-être...

Me SIMON POTTER:

Peut-être. Peut-être. Je ne veux pas m'objecter
au dépôt du témoignage. Cependant, c'est très
irrégulier de déposer des témoignages au complet venant 20
d'une autre cause ici. Je comprendrais qu'on dépose
des extraits, si on veut poser des extraits à monsieur
Waterson, mais déposer quatre, cinq (4-5) jours de
témoignage d'une autre cause, je trouve ça irrégulier
et fort peu prometteur pour l'avenir de cette cause 25

LA COUR:

Maître, vous voyez la préoccupation de votre collègue. Je suis sûr que vous y êtes sensible également. Est-ce qu'on aura besoin de tout ça ou si...

5

Me MAURICE REGNIER:

Oui, Votre Seigneurie. Et un des points qui va être utile en argumentation, et c'est pour ça que je me permets d'insister pour que le témoignage soit devant la Cour, c'est que je comprends les objections de 10 maître Potter qui sont pas mal plus que pour de la simple paperasse. C'est que ce que nous allons argumenter, c'est très simple, c'est que ce que monsieur Waterson vient dire, il l'a répété presque *verbatim* en mil neuf cent quatre-vingt-neuf (1989) et 15 que la position qu'il a devant vous n'a pas changé d'un iota par rapport à mil neuf cent quatre-vingt-neuf (1989). Alors...

LA COUR:

J'ai bien compris, d'ailleurs, que...

20

Me SIMON POTTER:

Il l'a dit. Le témoin l'a dit.

LA COUR:

... - oui, je crois - que toute espèce de *ban*

dans l'industrie du tabac est inutile et nuit à
l'économie.

Me MAURICE REGNIER:

Oui, mais c'est important, Votre Seigneurie,
parce que la partie...

5

LA COUR:

Et je m'excuse, mais j'ai noté en marge, c'est sa
conviction intime depuis... il l'a toujours cru.

Me MAURICE REGNIER:

C'est ça.

10

LA COUR:

C'est ce qu'il nous a dit.

Me MAURICE REGNIER:

Non, mais c'est important, Votre Seigneurie,
parce que la partie demanderesse - et je réfère à une 15
lettre que maître Mitchell avait envoyée à la Juge
Grenier - c'est que la situation avait maintenant
changé et que, là, ils amèneraient des éléments
pouvant... qu'ils convainraient la Cour de modifier ou
d'aller au-delà des conclusions de la Cour suprême en 20
mil neuf cent quatre-vingt-quinze (1995) par de la
nouvelle preuve.

Alors, moi, ce que je veux tout simplement
démontrer - puis ça va être important, là, on est au
coeur du dossier - c'est que, à date, la preuve qui est 25

amenée par la partie demanderesse, c'est la même que celle qui est répétée *ad nauseam* depuis...

LA COUR:

Alors, nous allons permettre la production, maître. Cependant, vous êtes conscient que ça devient 5 volumineux. S'il y avait lieu de rétrécir et de nous amener pour la plaidoirie des extraits ou...

Me MAURICE REGNIER:

Oui oui, nous résumerons.

LA COUR:

10

... la quintessence.

Me MAURICE REGNIER:

Nous résumerons le témoignage.

LA COUR:

Ou même un résumé qui sera entériné par la partie 15 adverse.

Me MAURICE REGNIER:

Je pense que maître Joyal voudrait avoir la permission de vous adresser quelques mots.

LA COUR:

20

Je vous en prie, maître Joyal.

Me MAURICE REGNIER:

Il est très gêné.

LA COUR:

Avec plaisir.

Me CLAUDE JOYAL,

pour la défenderesse:

Avec votre permission, étant donné que tout comme maître Potter, j'ai été impliqué dans le premier 5 dossier, j'ai des considérations évidemment concernant le volume. Le premier dossier contient deux cent trente-cinq (235) volumes. Lorsqu'on a comparu à la Cour d'appel, Monsieur le Juge Brossard nous a demandé de préparer des extraits, ce que nous avons fait. 10

En cours de plaidoirie, la Cour d'appel a posé d'autres questions. Le dossier étant disponible, on a été capables d'ajouter à la connaissance de la Cour d'appel, à partir du dossier, les autres éléments pour répondre aux questions de la Cour. Et ça a été la même 15 chose au niveau de la Cour suprême, il y a eu des cahiers d'extraits qui ont été préparés.

Je pense que la Cour est ici la porte d'entrée, je pense, de la preuve au dossier, et malgré le fait que certains documents sont volumineux, je pense que 20 c'est notre travail en bout de ligne à vous les résumer et à vous sortir les extraits, mais je pense que la Cour devrait avoir une politique de porte ouverte vis-à-vis la preuve plutôt qu'une porte étroite. On est dans un litige constitutionnel et votre décision 25

affectera l'ensemble des Canadiens.

Alors, il y a des règles de preuve que l'on a suivies relativement à la production de certains documents, mais il est évident qu'il y aura une preuve documentaire qui, en bout de ligne, risque d'être volumineuse. La transcription des débats parlementaires devant le Comité parlementaire de la santé ou à la Chambre des communes, ça peut représenter quelques milliers de pages, mais on doit vous déposer l'ensemble pour y extraire la moelle essentielle. 5 10

Et je ne pense pas qu'ici, de dire: Bien, produisez la moelle essentielle, ça restreint d'avance la preuve. C'est le commentaire que je tenais à vous faire.

LA COUR:

15

Très bien. Il est évident que cette cause-là met en parallèle ou en opposition, d'une part, la santé publique et, d'autre part, la liberté d'expression. C'est une cause qui nous dépasse tous de par son importance et par sa grandeur. Alors, très bien, je vais permettre... oui? 20

Me CLAUDE JOYAL:

J'ajouterais ceci. C'est qu'il y a quand même des conclusions dans la décision de la Cour suprême et je pense que c'est utile que la Cour puisse avoir sous 25

MICHAEL JOHN WATERSON (EXPERT)
PLAINTIFFS
CROSS-EXAMINATION

les yeux les documents et la preuve sur la base
desquels la majorité de la Cour suprême a considéré
qu'il y avait une rationalité entre la promotion et la
consommation.

LA COUR:

5

Alors, nous allons déposer sous D-44 le
témoignage de monsieur Waterson dans le premier
dossier.

LA GREFFIERE:

Témoignage hors cour?

10

LA COUR:

Non, témoignage en cour. C'est les notes
sténographiques de son témoignage au premier procès.

Me MAURICE REGNIER:

Ce sont les volumes 15, 16 et 17 de la Cour 15
d'appel également. Mais les dates...

LA COUR:

Donnez à madame la greffière, elle choisira dans
ça si elle... puis elle le mettra à son procès-verbal.

Next question, please.

20

Me MAURICE REGNIER:

89 Q- I'm showing you, sir, the report that you filed in the
TPCA case, that was filed under Exhibit RJR-26.

THE COURT:

So, in the first case, isn't it? It was in the 25

first case in front of this Court?

A- This was the first case, yes.

Me DOUGLAS MITCHELL:

Ce n'est pas le rapport de monsieur *Waterman*,
c'est le rapport de monsieur Waterson. 5

LA COUR:

On peut corriger, maître, première page?

Me MAURICE REGNIER:

Oui, oui, oui.

THE COURT: 10

So, what's the question?

Me MAURICE REGNIER:

90 Q- Have you read this report before appearing before this
Court yesterday, sir?

A- I read it thirteen (13) years ago, and so, obviously 15
I've seen it, yes.

91 Q- The very first sentence of this report, in the second
page, reads as follows:

"Advertising can be defined as the
paid for communication of 20
information."

Do you still agree with this statement?

A- Yes, I do. It is one definition, obviously.

92 Q- Are you familiar with the Benson & Hedges such products

or red products?

A- I know that they produce cigarette products. I stopped smoking many years ago and so can't claim recent familiarity with them.

93 Q- You know that these products are sold in England as 5
well as in Canada?

A- Yes.

94 Q- And up to, I think, a few years ago, they bore the
Royal crest by appointment, but the right has been
withdrawn. I'm showing you, sir, an advertisement.10.

THE COURT:

The late Queen Mother... not the late, I'm sorry.

Me DOUGLAS MITCHELL:

No.

THE COURT:

15

95 Q- She's still alive, isn't she? Queen Mother?

A- Yes, I think she's over a hundred (100) now.

Me MAURICE REGNIER:

Well, maybe the Attorney General could arrange a
little meeting. 20

THE COURT:

I wasn't joking about the Queen mother, I was...

A- No, it's...

96 Q- ... want to be very clear, she... 25

Me MAURICE REGNIER:

Maître Joyal pourra faire jouer ses relations
quand nous serons à Londres.

Me GERALD TREMBLAY,

on behalf of the Plaintiff Rothmans, Benson & Hedges: 5

You swore allegiance to her daughter.

Me CLAUDE JOYAL:

Monsieur le Juge, je pourrais peut-être faire une
démarche concernant le voyage à Londres, qui serait
essayer d'obtenir des passeports semi-diplomatiques. 10
Je ne sais pas si je peux en obtenir pour tout le
monde, mais ça peut peut-être faciliter certaines
choses relativement à l'entrée. Alors, je vais me
renseigner et je vous reviendrai là-dessus.

Me MAURICE REGNIER: 15

Ça va être en première classe?

Me CLAUDE JOYAL:

Ça, ça n'a rien à voir avec les billets.

Me MAURICE REGNIER:

C'est complètement un moment... et de nervosité, 20
j'espérais.

97 Q- Now, would you please tell the Court, to the best of
your knowledge, what kind of information is conveyed to
the reader of this advertisement?

A- Advertising is a complex process, My Lord, it requires 25

decisions on strategy before the advertising runs and it requires testing both before the advertisement's run to make sure it communicates the information that the advertiser wants, and then after the advertising has been run, to check whether indeed that information has been communicated. 5

The whole business is complicated and fraught with error and requires an intimate knowledge of what the campaign is trying to do. For me to try and guess what Benson & Hedges is trying to do here I think would be simply foolish, and not help the Court at all. 10

98 Q- Well, sir, how many advertisements have you seen in your life?

A- Possibly millions. Most of us see hundreds of advertisements today, but we don't notice most of them. 15
There are some big advertisements right in front of the courthouse, but I'm sure very few of us remember what they are despite having passed them this morning.

99 Q- Now, maybe I'm asking you a too difficult exercise, but would you agree with me that at least you can see the name of the product in this advertisement? 20

A- The name of the product is clearly there.

100 Q- Okay, and it appears underneath the two (2) packages, that's correct?

A- That's correct.

25

THE COURT:

101 Q- And it's a French girl, isn't it?

A- It's obviously a French girl here, right.

Me MAURICE REGNIER:

102 Q- Je ne la comprends pas, mais enfin... 5

LA COUR:

Je...

Me MAURICE REGNIER:

... maître Joyal me l'expliquera.

LA COUR: 10

Oui, mais c'est parce que c'était en référence au
témoignage du témoin précédemment, monsieur...

Me MAURICE REGNIER:

Ah bon, enfin.

103 Q- Now, we see that it's Benson & Hedges 100's, do you 15
know what 100's means?

A- No, I don't... is it a hundred (100) millimetres or
centimetres?

104 Q- I believe so.

A- Something like that. 20

105 Q- I believe so. So for a smoker, do you believe this
would mean something?

A- I presume so, yes, but again, I... it's a guess and I
have no idea what the advertisement is actually
communicating, if anything because it may, of course, 25

be almost completely ignored by the people it's intended for.

106 Q- Yes, but unfortunately, you cannot ignore the one I'm showing you. So we see on the two (2) packages that it's called "*De Luxe*" I believe that's a *De Luxe* 5 product?

A- Probably.

107 Q- One may agree or not, but that's the message that Benson & Hedges wants to convey to the consumer... or to the reader. 10

A- No, I would... excuse me, My Lord, I would actually disagree in the sense that it's on the packs and they're showing the packs, it is not necessarily at all a message that the advertiser is trying to convey. If it's on the box, then presumably it means something, 15 but this advertisement may be trying to do something quite different. The... it's very very difficult, most experts think it's impossible to guess what an advertisement is trying to convey simply by looking at it. 20

The strategy, the research that's gone into the advertisement campaign both before and in all likelihood after the campaign is all to determine whether it is possible to get across. Often, very

simple ideas like: will the advertisement be noticed at all, so to try and guess this advertisement is trying to give the impression that Benson & Hedges are luxury cigarettes is not necessarily the case at all.

108 Q- No, I'm just... we're just referring to the word "*De Luxe*" on the two (2) packages, that's all. Now, underneath the word "*De Luxe*", we have "*Ultra Lights*". Isn't it that a description of the product that is being sold? 5

A- It is, I presume, a description of the tar content or something of that sort. 10

109 Q- Now, isn't it a fact that as well the reader will, looking at the package appearing on this advertisement, see that there are twenty-five (25) cigarettes contained in the package? 15

A- If none of us can remember the advertisements we passed this morning on the way into the courthouse, I think it's most unlikely most people would remember that little tiny "25" on the box, but again, they well have taken that from this advertisement, who knows. 20

Me SIMON POTTER:

My Lord, I have no trouble with this testimony, but I do wonder what the utility of it is to the Court. Mr. Waterson is an expert on the functions and

economics of advertising, he said right from the beginning that he has no expertise in the creation of ad campaigns, and was made that very clear to Maître Régnier. All the questions being asked by Maître Régnier are being answered now by Mr. Waterson in his 5 role, which we all have, of laypeople, and I just simply don't see the purpose.

Me MAURICE REGNIER:

Si la Cour prête patience, la Cour verra où est-ce que j'en viens, Votre Seigneurie, mais ça m'apparaît 10 tout à fait en règle...

LA COUR:

Le Tribunal est patient.

Me MAURICE REGNIER:

Pardon? 15

LA COUR:

Le Tribunal est patient.

Me MAURICE REGNIER:

Merci. 20

THE COURT:

You may go on.

Me MAURICE REGNIER:

110 Q- Now, underneath the number "25", we see that these are

filter cigarettes, that's correct? That's another
information that's conveyed to the reader?

A- That's in a very small lettering under the "25", yes.

111 Q- Now, on the right... the package standing on the right
of this image, we see as well that they sell Menthol 5
cigarettes?

A- That's correct.

112 Q- Uh-huh. Now, on the package itself, do you see any
other kind of information about the product that is
being... that Benson & Hedges sells? 10

A- There's the... well, that little design at the top over
the word which, I presume, is the... possibly the Royal
crest or something, or maybe it's just a design, I
don't know...

113 Q- Uh-huh. 15

A- There is the health warning at the bottom, telling
people it's dangerous to smoke. But there's nothing
else explicit. It just says "*For People who like to
smoke*" at the top.

114 Q- Now, I'm showing you, sir, a package of... 20

I would like to file this advertisement, My Lord,
as Exhibit D-45.

LA COUR:

Vous n'avez pas produit l'expertise.

Me MAURICE REGNIER:

Non, mais j'ai l'intention de le produire, Votre
Seigneurie.

LA COUR:

Ah bon.

5

Me MAURICE REGNIER:

Alors, D-45 sera le rapport et D-46, l'annonce,
ou vice versa? Ça n'a aucune importance.

LA COUR:

Bien, là, on était rendus à D-45. Alors, c'est 10
comme vous voulez.

Me MAURICE REGNIER:

Et D-46, le rapport.

115 Q- I want to show you another advertisement for Benson &
Hedges which was published in the *Maclean Magazine* on 15
the twenty-fourth (24th) of March nineteen eighty-six
(1986). Once again, what kind of information is
conveyed... about the product is conveyed to the reader
by this advertisement?

Me SIMON POTTER:

20

Objection, My Lord. That's a repeat of question
which was asked before, and the witness said that he
thought it would be foolhardy to venture into that
area.

Me MAURICE REGNIER:

Well, the witness had... avait des réticences, Votre Seigneurie, parce qu'il y avait une image, il y avait un dessin, alors, il avait de la difficulté à l'interpréter. C'étaient des Françaises ou des 5 Anglaises ou je ne sais pas trop. Là, je lui montre quelque chose de plus simple. Alors, je vais simplifier la tâche du témoin.

Alors, je pense que c'est important de savoir, quand le témoin utilise dans son rapport que la 10 publicité... communiquer de l'information, je veux savoir de quoi on parle exactement et quel est le genre d'information qui peut être véhiculée par...

LA COUR:

Sous réserve. 15

Me MAURICE REGNIER:

Merci.

A- The advertisement is telling people that these are new B & H King Size 25 pocket packs which are one step ahead in quality and taste. There are twenty-five (25) 20 of them, they're Virginia cigarettes, now they're a special King Size, and there's the health warning at the bottom.

116 Q- I'm showing you, sir, a pack of Canadian Benson & Hedges 100's. 25

J'en ai un seul exemplaire, Votre Seigneurie,
mais on le produira après.

Would you please tell the Court what kind of
information is conveyed by this package to the smoker?

A- Well, there is... again you're presuming that people... 5
that I can see what people actually read from it, and
I can't, as I've made quite clear. In many cases
people simply ignore information on packs and in
advertisement, so in no sense can I guarantee. All I
can tell you is that with the pack presented right in 10
front of my face, and being specifically asked to read
out what the pack is saying, it's half a health warning
and half a book of Benson & Hedges 100's containing
twenty-five (25) cigarettes.

117 Q- I believe, if somebody is to read it, he will see that 15
the brand name is Benson & Hedges 100's, that's right?

A- That's right.

118 Q- He will see that these are qualified as Light
cigarettes?

A- That's right. 20

119 Q- That there are twenty-five (25) in it?

A- That's right.

120 Q- Okay. If he goes to the side of the package, he will
see that they are manufactured by Benson & Hedges
Toronto? 25

A- That's correct.

121 Q- Okay. And if he looks on the top of the...

Me DOUGLAS MITCHELL:

Monsieur le Juge, I just don't see the purpose of
this. Reading with the witness, an expert witness 5
who's come from London to give his opinion, the
contents of a box, a carton of tobacco that everybody
can read is a complete waste of everybody's time.

THE COURT:

I'm not sure where you're going, sir. Où est-ce 10
que vous vous en allez avec ça? Qu'est-ce que vous
voulez faire dire au témoin?

Me MAURICE REGNIER:

Votre Seigneurie, ce que je veux faire, la partie
demanderesse conteste le fait... ils disent qu'il n'est 15
pas possible pour eux de transmettre de l'information
aux consommateurs. C'est important. Ils ne savent pas
ce que c'est, la loi est trop floue.

Ce qu'on veut faire, c'est de démontrer par des
experts qui ont vu des milliers et des milliers de 20
paquets, par des gens qui ont étudié le tabac, qu'est-
ce qui est possible pour les compagnies de tabac de
transmettre comme information aux consommateurs et
qu'est-ce que la loi permet.

LA COUR:

Sous réserve. Continuez.

Me MAURICE REGNIER:

Merci.

122 Q- Now, we see on the top that there's an invitation to 5
put comments. There's a 1-800 phone number.

A- Yes.

123 Q- And then, you have the other information appearing on
the health warning. So, what kind of information is
conveyed to somebody who would look at this package by 10
the health warning?

A- I have no idea what kind of information would be
conveyed to the consumer. The consumer may ignore it,
may be frightened of it and, therefore, deliberately
ignore it, which is quite common when fear appeals are 15
used. All kinds of information may be given to the
consumer or may not be, but without doing detailed
testing work it's absolutely impossible, in my
judgment, to determine what a consumer in the course of
their busy daily lives will derive from either an 20
advertisement or a package.

124 Q- Would you please...

THE COURT:

Was this one filed?

Me MAURICE REGNIER:

25

Oui.

LA COUR:

Celui-ci n'a pas été...

Me SIMON POTTER:

Non, l'annonce? Non, ça n'a pas été coté encore. 5

LA COUR:

Alors, il l'est, sous D-47.

125 Q- Now, if somebody is to take time and to look at this
package and to read the information appearing on the
health warning, what is he to read? 10

A- Well, they will read a great deal about second-hand
smoke containing various chemicals, and these chemicals
can harm your children.

126 Q- Okay.

A- Both in French and English. 15

127 Q- Now, if he is to open... would you please open the
pack? Is there a new kind of information that is
conveyed to the smoker?

A- Yes, there is a thing saying, "*Vous pouvez arrêter de
fumer*", presumably in English and French. There we 20
are, yes. There is information saying that you can
stop, that it's not necessary to keep on smoking.
Now, I would like to file this pack, My Lord, as
Exhibit.

LA GREFFIERE:

D-48.

Me MAURICE REGNIER

128 Q- Now, I would like to show you...

THE COURT:

5

129 Q- What... your answer is that without any test concerning
the consumers, you can't see what is the perception of
the people, isn't it?

A- It's very well known in the advertising business that
any advertisement that you construct may well not 10
convey the information that you intended to convey.
And this is why there is a whole industry growing up
around pretesting advertisement so an advertiser,
together with his ad agency, will attempt to put
together a campaign and then, if it's a big one, as it 15
would be for a major product, the advertiser, in all
probability, will pretest this advertisement to attempt
to assess whether the message that they're trying to
get over, whether it's quality or price, is coming over
from the advertisement and the packs. And they will 20
then be still, despite pretesting, unsure about what
the eventual outcome is that they will frequently track
attitudes during the campaign and then post-test the
campaign to see if it did actually convey the
information to consumers that it was designed to. 25

So, simply looking at an advertisement in an attempt to prejudge that whole testing process often involving millions of dollars I think is simply... it has no purpose and it can't produce sensible influence.

Me MAURICE REGNIER:

5

130 Q- Again, Votre Seigneurie, is it still a purveyor of the Crown?

A- I'm afraid I don't know. I do have a feeling that it was until recently that was the case, but I can't remember.

10

131 Q- On réglera ça. On s'informerera.

LA COUR:

Alors, on va faire une pause de...

Me MAURICE REGNIER:

15

Maître Joyal nous organisera ça.

LA COUR:

... une pause d'une quinzaine...

132 Q- Fifteen (15) minute recess, sir.

20

RECESS

Me MAURICE REGNIER:

133 Q- I'm showing you, sir, a pack of Silk Cut which was bought at Waterloo Station last August. Are you 25

familiar with this brand of cigarettes?

A- Yes, I am.

134 Q- Would you please open the package? It won't explode.

A- Okay.

135 Q- Would you please tell the Court if one can find in this 5
package or anywhere on the package any information
about how to quit smoking?

A- There is no specific ticket inside, but it just says
"Smoking Kills" on the outside, which is a significant
inducement, I would have thought. 10

136 Q- Can you find any information about the content in
carbon monoxide issued by the smoke of these
cigarettes?

A- No. There's something about tar and nicotine, but
nothing I can see about carbon monoxide. 15

137 Q- Do you know what's the content in formaldehyde of these
cigarettes?

A- I don't even know what formaldehyde is, I'm afraid.

138 Q- Do you know what would be the content of hydrogen
cyanide? 20

A- No, I don't.

139 Q- And what about benzene?

A- No. *Non plus.*

140 Q- I would like to file this pack, My Lord, as

Exhibit D-49.

Me SIMON POTTER:

For the purpose of the record, I have no problem
with this, My Lord, but the fact is Silk Cut, it's a
brand sold in England. I don't know what use this is. 5

THE COURT:

We'll see.

Me MAURICE REGNIER:

Be patient. Be patient. Donnez-moi du temps
pour l'argumentation. 10

LA COUR:

Sous réserve. What's the name of the brand?

Me SIMON POTTER:

Silk Cut. 15

Me MAURICE REGNIER:

Silk Cut.

Me GERALD TREMBLAY:

Where was our copy?

Me MAURICE REGNIER: 20

Je peux aller en chercher d'autres, si vous
voulez.

LA COUR:

Ce n'est pas bon pour vous, maître Tremblay.

Me GERALD TREMBLAY: 25

Je me rends compte que je suis dans la cause pour
le mauvais produit.

LA COUR:

Et on aura bien un procès sur le scotch un jour.

Me MAURICE REGNIER:

5

141 Q- If I would tell you, sir, that this pack cost Her
Majesty five pounds (£ 5), would you be surprised?

A- I'm sorry?

142 Q- A Silk Cut pack costs five pounds (£ 5) at Waterloo
Station. Would that surprise you?

10

A- No, no.

143 Q- Do you know what's the Canadian equivalent of five (5)
pounds?

Me SIMON POTTER:

Oh, My Lord!

15

A- Twelve dollars (\$12.00) or something like that.

Me MAURICE REGNIER:

144 Q- That's quite correct. I'm showing you another pack of
Silk Cut which is a little bit different. Can you tell
what's the difference between this pack and the other 20
pack that His Lordship has in his hands?

A- This one says "*Seriously Damages Health*" whereas the
other one tell you it actually kills you, and it's
smaller.

145 Q- It has how many cigarettes?

A- Ten (10).

146 Q- Ten (10)? Do you know whether packages of ten (10) cigarettes can legally be sold in Canada?

A- I have no idea, I'm afraid.

5

Me DOUGLAS MITCHELL:

My Lord, can we really move on to a subject that's relevant to Mr. Waterson's qualification and his expertise?

THE COURT:

10

I'm not sure that is relevant, but we'll see.

Under reserve.

Me MAURICE REGNIER:

Oui, Votre Seigneurie, c'est que ça fait partie... c'est que les compagnies de tabac décrivent ces paquets-là, à l'époque où c'était permis, comme étant des *kiddie packs*. Ça coûte moins cher...

Me SIMON POTTER:

Ça, c'est faux, Votre Seigneurie.

LA COUR:

20

Alors, non, là, on est... continuons. Je vous ai permis...

Me MAURICE REGNIER:

Bien, vous me demandez une explication.

LA COUR:

Je vous ai permis...

Me MAURICE REGNIER:

Merci.

LA COUR:

5

Allons-y.

Me MAURICE REGNIER:

Merci. Alors, ça sera pour l'argumentation et
maître Potter pourra me traiter de menteur à tour de
bras, je suis habitué.

10

LA COUR:

Il ne dira pas ça, maître, voyons donc! Il va
dire que vous faites erreur, que vous, parlant pour
lui-même, vous exagérez, mais...

15

Me SIMON POTTER:

C'est ça.

Me MAURICE REGNIER:

Alors, c'est simplement pour montrer à la Cour
qu'est-ce que c'est qu'un paquet de dix (10). Alors, 20
la Cour visualisera - on est dans le concret - et le
jugement sera d'autant plus éclairant pour tout le
monde. C'est tout.

Me SIMON POTTER:

Ça n'existe plus sur le marché canadien, Votre 25

Seigneurie. Ce n'est pas contesté.

Me MAURICE REGNIER:

C'est exact. C'est exact. Alors, c'est pour ça
qu'on est obligés d'aller les acheter à Londres.

LA COUR:

5

D-50.

Me GERALD TREMBLAY:

Est-ce que c'est le but du voyage à Londres?

Me MAURICE REGNIER:

147 Q- I'd like to draw your attention, sir, to paragraph 5 of 10
your report.

A- Of the new one or the old one?

148 Q- The new one, I'm sorry.

THE COURT:

What page, sorry? Page 4, is it?

15

Me SIMON POTTER:

Page 3, My Lord.

THE COURT:

3? Sorry.

Me MAURICE REGNIER:

20

149 Q- The very first sentence of which reads:

*"The decision to make a minor
purchase, say one chocolate bar versus
another, is of little consequence to*

the purchaser."

Is it your testimony, sir, that the decision, for example, for a diabetic to buy a chocolate bar is a decision of little consequence?

A- I was referring, as in most of my testimony that, to 5
brands, the choice of purchasing one Cadbury's
chocolate bar versus a Mars chocolate bar, or one brand
of toothpaste versus another is of little consequence
to the purchaser, unless there are significant brand
differences, obviously. This is not a life questioning 10
or saving decision. It's something very... normally,
a purchase of this kind is of little consequence,
that's all. One toothpaste brand versus another, in a
competitive situation, the quality of the products is
frequently similar or the same. 15

Therefore, I was... excuse me, I think I'm going
to... I'm running out of voice. The consequence is
relatively minor from the point of view of the
consommateur.

150 Q- So you pay no attention to the product itself that is 20
being sold under a very specific brand, you only pay
attention to the brand?

A- My testimony, My Lord, is about the importance of
brands and brand advertising. It's not about by and

large products. It's about the impact of brand advertising on brand sales, because I don't believe that brand advertising has any influence on overall product sales. So that the whole of the testimony is focused on brand advertising and its consequences. 5

151 Q- Well, is it your testimony, sir, that smokers smoke brands or smokers smoke tobacco?

A- Smokers smoke brands. Smokers purchase at a point of sale a brand. Most smokers won't go into a shop and say, "Cigarettes, please." They will say, "I would like some Benson & Hedges cigarettes". Or when they pick even a soap powder off a shelf, they're obliged to make a choice of brands, and they do rarely go into a shop and simply say, "Cigarettes, please", in my experience. 15

152 Q- Is it your testimony, sir, that all brands of cigarettes are equivalent?

A- From personal experience, some are smaller and some are longer, and some have filter and some not, there are numerous differences between different brands of cigarette... different types of cigarette, different brands of cigarettes. 20

153 Q- The type of tobacco can be different?

A- Indeed the type of tobacco, French cigarettes, for example, are very different from Virginia cigarettes. 25

154 Q- The...

THE COURT:

Obvious also.

155 Q- I guess you're referring to Gitanes or Gauloises?

A- Exactly.

5

Me MAURICE REGNIER:

156 Q- At least they smell different. The content in toxic emissions can be different from one brand to another?

A- I'm sure that's correct. I have no personal experience, but I'm sure it is so.

10

157 Q- So a purchaser may try maybe to buy a brand which contains less formaldehyde?

A- I don't believe most people would understand what formaldehyde was, and therefore choosing between a brand... I certainly never heard anyone going to a shop 15 and ask for a brand low in formaldehyde.

158 Q- Do you know whether or not the Canadian Government conducted a public health campaign explaining to the population what formaldehyde is?

A- No, I am not aware about at all, I'm afraid.

20

159 Q- So you don't know whether the Canadian consumer... smoker knows... does not know what formaldehyde is?

A- I would be relatively secure in believing that most Canadian consumers don't really worry too much about formaldehyde and that the campaign by the Canadian 25

Government had not sought major behaviour changes
because of that, but once again, pure speculation.

Me MARC-ANDRE BLANCHARD

pour la demanderesse Rothmans, Benson & Hedges:

Monsieur le Juge, le témoin... les questions de 5
maître Régnier et les réponses du témoin démontrent...
nous ont fait faire le tour du cercle pour démontrer à
quel point ce n'était pas le bon témoin. Alors, je ne
sais pas pour quelle raison il pose ces questions-là et
il pose des questions sur la question de formaldéhyde, 10
le témoin dit qu'il ne sait pas ce que c'est. Après
ça, maître Régnier lui dit: "*Bien, êtes-vous au
courant qu'au Canada on a eu une campagne de
formaldéhyde?*". Alors, ça démontre juste à quel point
on fait de la tautologie, là, avec le témoin, qui 15
n'avance nulle part, Monsieur le Juge.

LA COUR:

J'ai tendance à être d'accord avec vous.

Continuez, maître Régnier. Soyez prudent.

Me MAURICE REGNIER:

20

J'essaie, Votre Seigneurie, j'essaie.

160 Q- You mentioned in this very same fifth paragraph of your
report some factors that can influence purchase
decisions. You mention price, that's correct?

- A- That's correct.
- 161 Q- Product quality?
- A- That's correct.
- 162 Q- Special promotional offers?
- A- That's correct. 5
- 163 Q- Uh-huh.
- A- We do know for a fact that people will tend to buy cheaper goods than other ones.
- 164 Q- Okay. Advertising as well?
- A- Advertising is designed to impinge on brand choice and 10
in some cases does; in many other cases, it fails to
communicate what it intends to, and because it's in a
competitive situation, it's one brand versus another,
in many cases it doesn't work, but sometimes it does.
- The Chairman of Unilever was quoted only recently 15
saying that ninety percent (90%) of his advertising
didn't work, the only problem was he didn't know which
ninety percent (90%), which I think does reflect the
situation that most major manufacturers of consumer
goods find themselves in. 20
- 165 Q- Are there any other factors, sir, which may influence
purchase decisions?
- A- There are other factors, of course, government health
warnings for example in the case of cigarettes.
- 166 Q- At paragraph 8, sir, you state, second sentence, 25

"What I spend to buy a car, which involves a large sum (some or all may be borrowed), and what I spend on a packet of cigarettes, which involves a relatively small sum, cannot be spent on anything else."

5

Have you ever calculated, sir, the amount spent by a smoker in England through a lifetime?

A- No, I haven't, this was intended to be a general statement. For example, one recent headline was that chocolate sales are falling in the UK for the first time in fifty (50) years because children are spending their money on mobile telephones instead. It was to illustrate this kind of movement in purchasing. When you spend something on mobile telephones, you have nothing left to buy chocolates or vice versa.

167 Q- You mentioned in one of your previous answers that many advertised brands fail, that's correct?

A- That's correct.

168 Q- I'd like to draw your attention to paragraph 11 of your report, which I think is supportive of this statement of yours, I read,

"First, marketing text books illustrate the problems by pointing

*out that as many as nine out of ten
new brands - most of which are heavily
advertised - fail to become successful
products."*

We were provided as a reference with a book by 5
Mr. Andy Hutchings, that's correct?

A- I think I provided three (3) references to support that
particular quote.

169 Q- Okay, well, we'll start with Mr. Hutchings' book which
is entitled "*Marketing: A Resource Book*". 10

We asked for a copy of the full book and we
weren't provided with any copy, I don't know why. If
Maître Mitchell was to... I think I left you a message
on last Friday.

Me DOUGLAS MITCHELL: 15

On Friday, asking to have a copy of the full
book...

Me MAURICE REGNIER:

Okay, so...

Me DOUGLAS MITCHELL: 20

I haven't been able to get it yet, no.

Me MAURICE REGNIER:

It's coming?

Me DOUGLAS MITCHELL:

Not... I got some articles this morning, the book I'm not sure where it's in transit, when it's in transit or if it is in transit, I'm not sure. I haven't had a chance to verify.

Me SIMON POTTER:

5

I'll say straight away, My Lord, that I myself do not undertake to go and find books for Maître Régnier. We have given him this page, if he wants the book, he can find it.

Me MAURICE REGNIER:

10

Votre Seigneurie, c'est...

THE COURT:

What is your question?

Me MAURICE REGNIER:

... un bel exemple de la collaboration que nous 15
avons de nos confrères. Ces documents-là, on les a
demandés depuis plusieurs mois. Ça faisait partie...

Me SIMON POTTER:

Non, vendredi.

Me MAURICE REGNIER:

20

Oui, si vous regardez...

LA COUR:

Maître, quelle est votre question?

Me MAURICE REGNIER:

Très bien.

25

LA COUR:

Ça va bien, là.

Me MAURICE REGNIER:

170 Q- Now, this, at page 115, sir, the author discusses about
maturity in the market, left column, last paragraph, 5
and we read,

*"During this phase, sales growth will
flatten out and any further growth
will result from replacement demand or
an increase in the total market rather 10
than the brand share."*

Do you know, in the cigarette market, in the
cigarette industry, what the replacement demand is
formed of, or is composed of? Who forms part of the
what is called *"the replacement demand"*? 15

A- This... if I may, this particular reference, I have no
knowledge of in specific terms. I was asked to produce
backup references for my nine (9) out of ten (10)... as
many as nine (9) out of ten (10) new brands fail. I
walked into the Advertising Association library and 20
picked out the first three (3) marketing text books I
could find and looked at them all, they all had all
have references to a number of products, a significant
number of new products that failed and I simply sent

the references off where I could. I have no knowledge of this man and his qualifications. I believe this to be an extremely academic book of some age and, therefore, I wouldn't wish anyone to be under illusions that I believe everything that this man has written. 5

Having said that, I believe that the whole question of replacement is rather a foolish concept. If we think of the car market, for example, one doesn't... I don't believe the car manufacturers sit around and discuss how they're going to replace the 10 demand from people that have died in road accidents or that simply died. I think they are aware of the fact that ninety-nine point nine percent (99.9%) of the population know about cars and they don't, because there are deaths, for most people at least, it's a 15 desirable commodity and when they come to a legal age to drive, they mainly start to drive and want a car.

I don't believe that advertising has anything to do with replacing dead car drivers, or dead smokers, or any other form of product for which people, when there 20 is a population shift or when people die. I think it's an irrelevant concept, basically.

171 Q- So, you will not agree with me if I were to tell you that the starters, kids or when any person who starts smoking would be considered, for the tobacco industry, 25

as being a replacement demand.

A- I can't understand how anyone would use a concept like that. People do not talk of replacement demands. In my experience, it may be that in some cases there have been statements to that effect but I believe it's a 5 misguided way of looking into market. When you're advertising cars, you think about the people that are in the market to buy a car right now. You don't think about convincing young people that cars are desirable commodities: they know, they don't have to be told 10

172 Q- Do you know how many people, in Canada, start smoking each year?

A- I have no idea, I'm afraid.

173 Q- Do you know how many people, how many smokers die each year? 15

A- I have no idea, I'm afraid. While we're waiting, I do know, My Lord, that a hundred thousand (100,000) people in the UK are either killed or seriously injured by cars every year, which is a significant number. But I don't believe people talk about replacing them in any 20 sense.

174 Q- I'm showing you, sir, a pack of...

THE COURT:

175 Q- It's twice this amount in France.

A- And it's twice this amount in France, yes. Many of 25

them females.

176 Q- Here, in this country, you can't say that, just can't.
Because it's not true. Sorry, Maître Régnier.

Me MAURICE REGNIER:

177 Q- I'm showing you, sir, a pack of Matinée Ultra Light. 5
I would like you to look at the health warning. Could
you please tell the Court, according to this health
warning, how many people die from murders in Canada?

A- Five hundred and ten (510).

178 Q- And of alcohol? 10

A- One thousand nine hundred (1,900).

179 Q- And from car accidents?

A- Two thousand nine hundred (2,900).

180 Q- And from tobacco?

A- Forty-five thousand (45,000). 15

181 Q- Thank you.

I would like to file this pack, My Lord, as
Exhibit D-?

THE CLERK:

D-51. 20

A- May I make a comment, My Lord, on the statistical
nature of that comment.

THE COURT:

182 Q- Yes.

A- If one takes man-years rather than simply numbers, you 25

would get a different picture. People die from car accidents at age 1 and, indeed, from the other factors cited, in their youth. If you're killed by a drunken driver, you may be of any age whereas smokers tend to die when they're at the very end of their lives. So, 5 in terms of man-years of death, I think if you represented the figures in a different way, you would get a very different answer.

183 Q- But you're not an expert in that field as you're not an expert as... 10

A- I have seen that particular figure used as an example of the misleading nature of statistics, that was the only way I... the reason I commented.

Me MAURICE REGNIER:

184 Q- So, are you implying that the Canadian Government is 15 misleading the population and smokers with these figures, sir?

A- If they're trying to suggest that that is the only way of looking at it, then indeed it is, because I personally have example of the horrors of alcohol when 20 it's misused and I think it's... one could make statements of this sort in a number of product areas.

185 Q- Yes, but unfortunately we're discussing tobacco in this case.

A- Of course. 25

186 Q- If you go to page 110 of this Hutchings' book, 110,
okay, the very last paragraph of this page, which
reads:

*"Specifically, an organisation
endeavours to instil the brand image
concept by offering a product which
satisfies consumers' physical and
emotional needs and contains a
rational benefit or USP... - whatever
that means, I don't know - ... while
all elements of its marketing mix are
perceived as compatible, believable
and relevant".*

5

10

Would you please tell the Court what kind of
emotional needs the tobacco industry tries to... is 15
endeavouring to instil within its brand image of the
cigarettes?

A- I'm afraid, My Lord, I simply can't comment on that
without seeing the research and the activity plans that
have gone along with those campaigns. 20

187 Q- Would you please look at paragraph 14 of your report.
The last sentence, I think, the second to last sentence
which reads:

"Marketing in contrast seeks out the

*views of consumers and the company
then tries to make what the customer
wants".*

A- I'm sorry, I'm not with you. Is it page 14?

188 Q- Paragraph 14, yes.

5

A- Which sentence?

189 Q- The one starting with "*Marketing*". It's the third one.

THE COURT:

Page 6.

Me SIMON POTTER:

10

Paragraph 14.

Me MAURICE REGNIER:

190 Q- Page 6.

A- Ah! page 6, I'm sorry.

191 Q- Yes.

15

THE COURT:

192 Q- "*Marketing in contrast*".

A- Sorry, I missed that. Which paragraph?

Me MAURICE REGNIER:

193 Q- The very first line on the top.

20

A- The very first. Okay.

194 Q-

*"Marketing in contrast seeks out the
views of consumers and the company*

then tries to make what the customer wants. The idea is very simple - consumers have needs, brands satisfy those needs, and advertising is meant to communicate to the consumer that the brand in question satisfies those needs".

5

Would you please tell the Court what are the needs of smokers which are satisfied by the brand in question?

10

A- Well, again, I really can't comment, I simply have no knowledge of how cigarettes... I've never seen cigarette research, I simply don't know what the research shows.

195 Q- If I am to tell you, sir, that, for example, smokers 15
need to be reassured about their smoking habit, would that make any sense?

A- Well, it would be complete speculation on my part to venture an opinion of that kind.

196 Q- At paragraph 17, sir, you make a reference to Grant, 20
nineteen... Well, we were provided with a few references, but I believe this, the references you cite in paragraph 18 from Grant comes from his nineteen eighty-two (1982) paper.

- A- I found a copy of the paper and have provided it to Mr. Potter and Perreault, I think.
- 197 Q- Uh-huh. And I've noticed that this citation from Grant is one of your favourite citation.
- A- Ah! I wouldn't put it as far as that. I've noticed the citation that I think is interesting but there are many others of a similar nature, which show that trying to obtain large changes in human behaviour is very much more difficult than getting... than trying to obtain small changes like choosing a toothpaste. 5
- 198 Q- Well, isn't it a fact that you used this citation of Grant before the House of Commons committee in nineteen eighty-seven (1987)?
- A- It's entirely possible. I'm sure, if you're suggesting that I did, I did. But I can't remember. 15
- 199 Q- And isn't it a fact that you used also the very same citation in your report, report RJR-26?
- A- I'm afraid I must blame this on the... of the word processor, the fact that instead of continuously trying to reinvent the wheel, one, sometimes, simply uses the same quotation when an instance is called for. 20
- 200 Q- I would like to read to you the very last sentence of Mr. Grant's conclusion.
- Je n'ai pas de... En avez-vous une copie pour la Cour? 25

Me SIMON POTTER:

Oui. Bien, j'imagine que vous faites référence
à cet article-là?

Me MAURICE REGNIER:

C'est la référence, oui.

5

Me SIMON POTTER:

"The moderating influence"?

Me MAURICE REGNIER:

*"Alcohol education, does it really affect
drinking problems"*. That's in nineteen eighty-two 10
(1982), this one.

Me SIMON POTTER:

Non, c'est...

LA COUR:

N'en donnez pas d'autres, maître Potter.

15

Me SIMON POTTER:

Ce n'est pas le même. Je n'ai pas celui-là.
J'ai celui que j'ai.

Me MAURICE REGNIER:

J'ai celui que vous m'avez donné.

20

Me SIMON POTTER:

En fait, on vous en a donné quatre (4) ou cinq
(5).

Me MAURICE REGNIER:

C'est ça.

Me SIMON POTTER:

C'est ça. Alors, je ne sais pas lequel vous avez
en main. C'est tout et je n'ai pas des copies
additionnelles de ce que vous avez en main. 5

Me MAURICE REGNIER:

Regardez celui que je veux montrer au témoin et
vérifiez dans vos papiers si vous l'avez.

Me SIMON POTTER:

"*Alcohol education*" by Grant. 10

Me MAURICE REGNIER:

Oui, mil neuf cent quatre-vingt-deux (1982).

Me SIMON POTTER:

Oui, bien, je pense que je n'ai pas de copie
additionnelle. 15

LA COUR:

On vient de vous en mettre devant vous, non? Ce
que votre collègue...

Me SIMON POTTER:

Non, moi, j'ai des copies additionnelles que 20
j'ai, moi, d'un autre article.

Me MAURICE REGNIER:

Est-ce que vous pouvez en...

LA COUR:

Non, il n'en a pas.

Me MAURICE REGNIER:

Ecoutez, bien, j'en ai une copie pour le témoin,
j'en ai une copie pour la Cour, j'en ai une copie... 5
j'ai un extrait dans mes notes. Alors, je pense qu'on
va pouvoir se débrouiller avec ce qu'on a.

201 Q- So, you're familiar with this paper, sir?

A- Yes, I'm familiar with it. But, again, it's not
bedside reading, it's something that I have seen and 10
read once, possibly a long time ago, certainly a long
time ago.

THE COURT:

202 Q- Are you telling the Court that you're not reading these
documents before sleeping each night? No? 15

A- No.

Me MAURICE REGNIER:

203 Q- So, you didn't review this paper before preparing your
report, the report that is filed before the Court?

A- As I say, I think I've used... I know Marcus Grant 20
quite well and I know his views on the subject in
question. I believe, were he here today, he would say
that increases in knowledge are relatively easy to
achieve because, in many... or health obviously,
knowledge of the dangers of smoking are now universal. 25

So, increases in knowledge, it is incontestable or relatively easy to achieve but measurable changes in drinking behaviour or smoking behaviour are more difficult to achieve. And I'm sure that the quote I was using was simply intended to illustrate that point. 5

204 Q- Now, I would like to ask you to look at the conclusion of this paper.

THE COURT:

Page 204?

Me MAURICE REGNIER: 10

Yes, the very last sentence, no, second to last sentence which starts with the words: "*If any single lesson*". Do you have it, My Lord?

THE COURT:

Yes. 15

Me MAURICE REGNIER:

Okay.

205 Q- So, it reads:

"If any single lesson emerges from that review, it is that the evidence establishes beyond doubt that concentrating upon specific target groups and basing the education upon specific and pragmatic objectives, it 20

*is indeed possible to achieve distinct
though modest success. In such an
enterprise, however, a modest success
is worth a great deal more than a full
cartload of repetitious failures".*

5

Do you agree with Mr. Grant's conclusion?

A- It's very difficult to know precisely what he's talking
about but I presume that, for example, if he was
talking about cigarette education... education about
smoking behaviour, he is saying that rather than
broadcasting a very general message to the population
at large, it might be well to, for example, focus on
young people to tell them about the dangers of smoking.
If that is what he is intending to say, then, I would
agree with it. It's effectively tailoring specific
messages to specific audiences I think he's saying.

206 Q- Now, I would like to draw your attention to paragraph
19 of your report, in which you make reference to a
citation by Mr. James Mintz.

Me DOUGLAS MITCHELL:

20

Tu vas le déposer?

Me MAURICE REGNIER:

Pas tout de suite. Pas tout de suite.

LA COUR:

Bien, après ça, je vous en prie, n'insistez pas.

Me SIMON POTTER:

Ah! non, non, je veux juste... It's the record
keeper who...

LA COUR:

5

C'est parce que s'il avait dit oui, vous auriez
fait une objection, je pense.

A- I have a copy here, if you're looking for one.

Me MAURICE REGNIER:

Just...

10

THE COURT:

It's Mintz. Mintz.

A- Mintz.

Me SIMON POTTER:

We have additional copies here, if you'd like 15

Me MAURICE REGNIER:

You do? Okay, good.

Me GERALD TREMBLAY:

Ça arrive à tout le monde.

Me MAURICE REGNIER:

20

207 Q- This paper was cited by you, I think it was used at the
first trial in nineteen eighty-nine (1989).

A- I don't think that's the case, no, I think that
reference came to my attention relatively recently, so
I'd be quite surprised if it was cited in the original 25

one.

208 Q- If you can give me a few seconds, My Lord, we'll
find it back.

Me DOUGLAS MITCHELL:

I think he misunderstood the question, whether it 5
was in his original report. I don't think anybody
takes any issue with the fact that that document was
filed as an exhibit in the first case.

Me MAURICE REGNIER:

In fact, it was. 10

Me DOUGLAS MITCHELL:

I think in the first... yes, it was.

Me MAURICE REGNIER:

Okay.

Me DOUGLAS MITCHELL: 15

I think Mr. Waterson understood the question was,
was it in his report.

A- It wasn't in my report and I wasn't aware of it at that
time.

Me MAURICE REGNIER: 20

209 Q- Okay, the whole paragraph reads as follows.

THE COURT:

Oui, oui, ah oui.

Me MAURICE REGNIER:

Je suis à la page... 25

LA COUR:

On respire, allez-y, on vous écoute.

Me MAURICE REGNIER:

... 3 de 15, maître Potter.

Me SIMON POTTER:

5

3 de 15.

Me MAURICE REGNIER:

3 de 15, 1, 2... le troisième paragraphe, sous le
titre "*Background on the 'Break Free' Campaign*".

LA COUR:

10

Oui.

Me MAURICE REGNIER:

210 Q- The whole paragraph reads as follows,

*"However, it is important to recognize
that social marketing programs,
particularly mass media campaigns,
cannot reasonably be expected to
reduce smoking in any group."*

15

That's your citation.

A- That's correct.

20

211 Q- Now, we continue our reading,

*"This is why the social marketing
element of 'Break Free' is only one
aspect of the National Program to*

*Reduce Tobacco Use. At the same time
it should be acknowledged that social
marketing is a potent and essential
element of comprehensive programs
intended to reach, inform and
influence people."*

5

Do you agree with this last sentence from Mr. Mintz?

A- If I understand it correctly, what he is saying is
exactly what I have been saying, which is that trying
to educate children to the dangers of smoking is indeed 10
a very practical and useful thing to do, but that
expecting mass media campaigns to do the same thing is
a much more debateful activity and can't really be
expected to have significant results. So I think it
ties in almost exactly with the thrust of my report 15

212 Q- Would you please tell the Court where you... what makes
you think that Mr. Mintz' statement is limited to
influence young people?

A- I have no idea whether it is limited to young people,
but I imagine that... it was that sort of aspect of 20
social marketing programs that he was talking about.
I know that in the UK one of the major elements of
these sorts of campaigns has been educating young
people and children, and I... from... were I to be

involved with it, that would certainly be the kinds of things that I would look at rather than mass media campaigns. So from my point of view, I think he's absolutely correct, but it may be that I have totally misread him and that he is doing something else 5 entirely that I don't know about, but as long as it's not mass media, I would still agree with it.

213 Q- Is there a reason why you did not put the entire quote in your report?

A- I was asked to be brief. Most of the quotes have been 10 very simple short sentences. I don't believe that if I had put the whole of the quote in it would have added anything to it, and I don't believe if I had... by leaving it out in any sense altered the meaning of the thing. I don't believe it was a selective quotation, 15 it certainly wasn't intended to be a selective quotation.

214 Q- Don't you think that selecting only the very first sentence can be misleading to the reader of your report? 20

A- I think that for the audience if I was addressing, it's not misleading at all. If it is... if it has been, then I apologize, but I read the whole paragraph as being one... and indeed the report is being one hundred percent (100%) in line with what I believe, and I don't 25

think it's possible to mislead... to be misleading in that sense from that... from omitting the last bit of the paragraph.

215 Q- I would like you to turn to paragraph 20 of your report. You say that,

"Some collective attempts have been made to change behaviour patterns by generic advertising campaigns but they have been notably unsuccessful. For example, many years of consistently high levels of advertising designed to persuade the public to drink more milk have totally failed to halt a continuing decline of milk sales. In the egg market, consumption has similarly continued to fall notwithstanding heavy and prolonged generic advertising in an attempt to halt the decline."

Is that true, sir?

A- As far as the UK is concerned, I believe that to be true, it is certainly true because I re-checked the figures before coming here, that for the last forty (40) years at least milk sales have continuously

declined and egg sales have continuously declined, and there have been some very famous advertising campaigns linked with those products.

"*Drink a pint of milk a day*" for example, and "*Go to work on an egg*" have been campaigns that have 5
connected, I think, and people remember the phrases and the slogans and the music, but they consistently prefer to eat cereals or adopt the French habit of eating croissant and a coffee in place of the more traditional fried eggs or whatever. 10

So I think that it's perfectly legitimate to say that despite many years of heavy advertising within the UK, in the market I'm familiar with, but I do believe there are many more examples. For example, I think I referred to the tea campaign yesterday or the day 15
before, and bread campaigns. I believe there are lots of instances where although advertising agencies may have persuaded gullible government departments to spend money on these things, the campaigns have actually failed. 20

THE COURT:

216 Q- And what about beef campaign now?

A- The beef campaign was not very successful in the UK but it was... it did arrive just before the vache folle

episode, and so I don't think we can draw huge conclusions from that.

Me MAURICE REGNIER:

217 Q- Well, you made a few references, sir, in your testimony, to your organization, WARC, so we made a few 5
research on this... on your WARC site, and we found some papers discussing about generic campaigns about milk.

THE COURT:

218 Q- Is Scotland part of UK? 10

A- Scotland is not part... it's definitely part of the concept of UK, Scottish people... Scottish people tend to think otherwise in the main.

Me MAURICE REGNIER:

219 Q- Well, would you like to modify your report accordingly? 15

A- No, I think, in general terms, the quotation stands.

220 Q- Well, this paper is... well, are you familiar with this paper?

A- I'm not familiar with this particular paper, but there have been a number of cases of a similar nature which 20
have suggested that milk advertising has been successful... I personally don't believe that these are credible. I don't believe, given the endless decline of milk sales over a long long period of time, like forty (40) years, that these are anything else than 25

minor blips. There is no question that milk consumption has declined almost continuously over a very long period of time despite the milk campaign.

221 Q- Now, if you look at the very last page of your document, last page, we see that it comes from the 5 WARC. That's the company you founded?

A- That is the company I founded, yes.

222 Q- Could you tell the Court what are the Advertising Effectiveness Awards?

A- The Advertising Effectiveness Awards are a series of 10 awards given by advertising agencies to congratulate each other on their successes. They're an in-house award of the Institute of Practitioners in Advertising, which is a group, a trade association of advertising agencies, and they give themselves awards each year to 15 show how clever they've been.

223 Q- And we see at the very last paragraph the section entitled "*Introduction*":

"This case history hopes..."

THE COURT:

20

Sorry, I missed... first page, did you say?

Me MAURICE REGNIER:

First page, My Lord.

THE COURT:

Okay.

Me MAURICE REGNIER:

I was asking a question about what appears on the very top of this paper, "*Advertising Effectiveness Awards*".

5

224 Q- And then we have the last sentence of the part of this document entitled "*Introduction*", last paragraph, just before "*Background*", which reads that:

"*This case history hopes to establish that, during the campaign, the decline in sales was halted and increased volume sales were achieved. This is in contrast with the position in England where sales have continued to decline.*"

10

15

If we look at the overall conclusions, it says that, second to last page, which reads that:

"*The combined increase in total volume sales from April 1990 to March 1992 was 1.3%, representing some eight million litres of milk. The advertising campaign clearly had a significant impact in changing the way people in Scotland think about milk.*"

20

Milk is seen by more and more people as an acceptable soft drink and there is evidence of increased volume consumption by drinking. This has been achieved in the face of considerable competition from new and established soft drinks, many of them powerful international brands."

5

Do you agree with this conclusion?

A- If they are... they are citing a very very short period 10 of time, a few years. I would disagree that... I would disagree with the conclusions simply on the basis that I know as an absolute fact that over a forty (40) year period there have been many attempts to... many attempts using advertising to reverse the decline, and 15 it has been unsuccessful.

There is no question that milk sales today are much lower than they were forty (40) years ago and I believe that it's possible that this, over a very limited period of time, in very special circumstances, 20 there was a reversal. In all products there are little blips and ups and downs all the time. It's conceivable it was achieved by the advertising, but my view is that over a long period of time there is absolutely concrete

evidence that milk sales have continued to decline despite very large amounts of advertising money spent on attempting to reverse that decline.

If, over a two (2) or three (3) year period in Scotland, that wasn't the case, I would still suggest, 5
My Lord, that the generality of the case that I'm suggesting is true and that were generic campaigns of this type perceived as being successful by manufacturers, there would be many many more of them. And the fact is there are very very few of them. 10

225 Q- My Lord, I would like to file this document as D-52.

226 Q- Would you consider tea as being a mature market in England?

A- I'm sorry, TSB? 15

227 Q- Tea.

A- Tea?

228 Q- Tea.

A- Tea is a very mature market. It's been around for many centuries and I believe that everybody knows about tea. 20
So, in that sense, it is not a... it's not a new area where people might expect to gain increased knowledge about the presence of the product from the advertisement.

229 Q- So, once again, we found a document on your Web site, 25

sir, entitled "*The Campaign for Generic Advertising of Tea*". Are you familiar with this campaign, sir?

A- I am particularly familiar with this campaign, because I did check on this particular one before I arrived to testify. 5

230 Q- Now, if you look at the overall conclusions of this paper, that's at the third to last page, it reads that:

"The conclusions to be drawn from the first two (2) years of the current campaign undertaken by the UK Tea Council can be summarised as follows:

1. Attitudes to tea were favourably affected.

2. Tea purchasing behaviour in the advertised areas showed a significant improvement over those areas not yet covered by the campaign. 15

3. The policy of concentrating resources regionally to achieve the required impact was vindicated. 20

4. The consistent use of TV as the major medium, with a supporting women's press to achieve maximum impact on the key target market, was

justified."

Do you agree with these overall conclusions?

A- I'm afraid I don't, My Lord. If you turn over to the final page, the penultimate page, figure 1. And if you look at "*Apparent tea consumption per capita*", what 5 they're actually talking about is the tiny little blip at the end, under nineteen seventy-eight (1978). The trend line, the big thick line, continues to go downwards as it has on this chart from nineteen fifty-eight (1958). And if you project that figure forward, 10 which I did before coming, it does, indeed, continue to go down as it always has for many years. And I believe that this is simply an illustration of one advertising agency congratulating another and that it is not, in fact, a very meaningful conclusion. 15

Tea consumption fell before that campaign, it continued to fall after it and the tea companies have not felt it worthwhile to continue that campaign, which I think, in itself, is the most concrete proof that it was really not productive in reversing tea consumption 20 levels.

231 Q- Can you tell the Court where without and how without this campaign tea consumption would have fell?

A- It may have... it is absolutely true that it may have

gone down more quickly but if I could refer you to the little blue book, which you have, the marketing copy book, I can demonstrate on the spot the fact that tea consumption has continued to decline in pretty much a straight line for the twenty (20) years subsequent to that campaign, and that this campaign certainly had no long term impact of any description. And it is also true, I believe, that the campaign was discontinued, which is usually a certain illustration of its lack of impact. 10

232 Q- So, I'd like to file this document as D-.

THE CLERK:

53.

Me MAURICE REGNIER:

233 Q- Is there a reference... a distinction, sir, to be made between generic advertising and what one may call social marketing? 15

A- I think there is a very major difference. In generic advertising, the usual objective is to get rid of agricultural surpluses which have been generated by subsidies or manipulation of markets by governments or some other body charged with a commodity like milk. Social, as I understand it, what you mean by social marketing is campaigns trying to prevent harm by, for example, getting people to smoke less, or drink less, 25

or drink more modestly, or to avoid crossing the road without looking where you're going.

And I think the two (2) kinds of campaigns are very, very different in scope, in objectives and, indeed, in nature. So, I would suggest they are very different, indeed. 5

234 Q- Now, once again, we found a document on your Web site, entitled "*Scotland, the health of a nation*", "*How Advertising Helped Begin a Change in a Nation's Health*". Are you familiar with this document that I'm 10 showing you?

A- I'm not familiar with this one. I would stress, My Lord, we have thousands of cases on the Web site and I can't be expected to be familiar with all of them, obviously. 15

235 Q- So, I'd like you to have a look at the second page of this document, the section entitled "*Effectiveness*", the first paragraph of which reads:

"Any investigation in the campaign's effectiveness must bear in mind that what might be considered small shifts in other markets represent significant results when it comes to health education. If the advertising helps 20

reduce the percentage of smokers by one percent (1%), the actual numbers are huge. In addition, the effect on the individual's health and lifestyle is dramatic, not to mention the scale of the subsequent potential savings to the NHS.

5

Proving changes in behaviour is an extremely complex and lengthy task. Rarely do the target audience change behaviour overnight, nor is behaviour change sequential along a conveyor belt which starts with attitude and eventually leads to action".

10

Do you agree with this statement, sir?

15

A- Without some investigation, I think I'd be reluctant to agree entirely. But I think that health education is indeed a very different business to selling brands. And insofar as the statement refers to that, I would be in complete agreement with it.

20

236 Q- So, I would like you to turn to page 4 of this document, the fourth page, top of the page, which begins with "Smoking". It says:

"In nineteen ninety-six (1996), forty-

eight percent (48%) of smokers did not see their smoking as a problem - an attitude that was an indication that they were entrenched smokers, unlikely to change their behaviour. In nineteen ninety-seven (1997), this figure fell to thirty-nine percent (39%).

5

In nineteen ninety-six (1996), forty-six percent (46%) of smokers did not know how to go about stopping. In nineteen ninety-seven (1997), this figure fell to forty percent (40%). Smokeline attained its highest ever levels of success. The average number of interactive calls each month reached thirty-five hundred (3500) and levels of awareness of the service achieved eighty-three percent (83%)."

10

15

Do you challenge, in any manner, these figures, 20
sir?

A- I don't challenge the figures in any sense but I would state that any figures of this sort, would, if I was to look at them in detail, would need to be thoroughly examined. For example, it says the average number of 25

interactive calls reached three thousand five hundred (3500), its highest ever level. But it doesn't say what the previous figure was and what that was to do with the advertising campaign.

I do believe that health education is a completely valid thing to do using advertising to convey information. And I've always suggested, I think in most of my published works, I've always suggested that that is a perfectly reasonable thing to do. These are market research results, however. These are not statistics that illustrate declines in actual smoking. These are the results of market research companies asking people what they have been doing. And it's well known that after health education campaigns, or indeed after periods of activity, when a government suggests that smoking is unhealthy, that people tend to reply differently to questions. 5 10 15

So, for example, we're back, in one sense, we could be back to the situation of the market research into hearing a man in front of his wife and asking him how much he drinks. Well, in that situation, it's logic to get a very distorted view of reality and it's entirely possible that the changes in responses to questionnaires are simply because people have seen a lot of anti-smoking advertisements and have modified 20 25

their responses to questionnaires.

This kind of behaviour is well understood and known. And the fact that these percentages change is not at all as important to variable as actually saying what happened to tobacco consumption in Scotland. I 5
can't say that these figures don't reflect successfully health education campaigns, it's highly possible they do. But if you're asking me about those particular figures in that paragraph, I would naturally be cautious about accepting them without quite a lot of 10
further investigation, as it reflects the reality.

In particular, I would want to say what has happened to smoking figures for smoking as in the national statistics which are accurate.

237 Q- I'd like to file this document, My Lord, as... 15
THE CLERK:

D-54.

Me DOUGLAS MITCHELL:

D-54?

Me MAURICE REGNIER:

20

Oui.

Me DOUGLAS MITCHELL:

Merci.

THE COURT:

If you don't mind, we'll have a recess for lunch 25

MICHAEL JOHN WATERSON (EXPERT)
PLAINTIFFS
CROSS-EXAMINATION

and we'll be back at two fifteen (2:15).

LUNCH RECESS

In the year of Our Lord, two thousand and two (2002) on this
twenty-second (22nd) day of January, PERSONALLY CAME AND
APPEARED:

MICHAEL JOHN WATERSON (EXPERT), witness already heard, 5

WHO, after having made a Solemn Affirmation, doth depose and
say as follows:

Me MAURICE REGNIER:

238 Q- I'd like to show you, sir, a one and final document 10
coming from your Web site about eggs, since paragraph
20 of your report deals with eggs. And we have a
Canadian example of a generic campaign dealing with
eggs. Are you familiar with this Canadian campaign
about eggs, sir? 15

A- No, I'm not.

THE COURT:

239 Q- It's far from your place, isn't it?

A- It's a lot more... yes.

Me MAURICE REGNIER: 20

240 Q- I would like you to look at the fourth paragraph of the
introduction which says that:

*"The campaign started in January 1996,
with immediate results. AC Nielsen*

*and Stats Canada reported 7% increases
in 1996 per capita consumption;
stunning when compared to the 17 year
decline. This was followed by a 2%
increase in 1997, with all major
attitudes to eggs improving. Nothing
but the new advertising could have
caused this turnaround. All other
marketing variables were unchanged,
with pricing, if anything, edging up."*

5

10

Now, would you like to change your testimony on
the issue of eggs in Canada, sir?

A- Well, my testimony wasn't about eggs in Canada, it was
a reflection of the forty (40) year decline in the UK
egg market. But I would also point out, from a very 15
brief reading of this particular case, that the
campaign appears to have been a simple communication of
information, which, as I've always maintained,
communicating information can be done quite easily,
although frequently there is a problem with activity at 20
the end of it.

But here they seem to have simply been telling
Canadians that eggs do not lead to cholesterol
problems, which I think is a fairly general belief

everywhere. And if indeed they could advance proper information that changes perceptions, as in "Tobacco causes illness", then it's simply a form of health education campaign and, I would suggest, quite different from the campaigns that have been in use in 5 the UK where they have been attempting to use... they have been attempting to use messages like "Go to work on an egg" or simply "Drink milk".

This, I would suggest, falls simply into the category of a health education campaign. I must 10 confess I thought eating eggs did give you a cholesterol problem. Now I know better.

241 Q- And did you know whether or not if trends in consumption in eggs in Canada declined after the end of the campaign or if it... 15

A- I don't...

242 Q- ... followed its course?

A- I don't, I'm afraid. All I can comment on is the forty (40) year continuous decline in the UK despite the pretty regular advertising of eggs. I'm not familiar, 20 I'm afraid, with the Canadian egg market. This is quite a recent case history, dated two thousand (2000), and therefore it would indeed be fascinating to see what happens over the next three (3) or four (4) years. Certainly on a UK basis, the consumption will simply 25

fall again, unless people have really new information about the deleterious effects of egg eating.

243 Q- Maybe to help you, sir, I have here from Stats Canada the "*Food Consumption in Canada 2000*" which shows the level of consumption of eggs from nineteen sixty-two 5 (1962) to two thousand (2000).

A- Thank you.

244 Q- The campaign started, as it is noted in this "*Canadian Advertising Success Stories 2000*" about eggs, the campaign started... 10

THE COURT:

Maître, Maître. Yes.

Me MAURICE REGNIER:

245 Q- ... in nineteen ninety-six (1996). And can you tell from this column on eggs if the trend from nineteen 15 ninety-six (1996) to two thousand (2000) was maintained?

A- It does appear to be that there's been a marginal increase in egg consumption over the past four (4) years, indeed. 20

246 Q- So I would like, My Lord, to file as Exhibit D-55 the...

LA COUR:

Les deux (2), en liasse?

Me MAURICE REGNIER:

... "*Canadian Advertising Success Stories*" on
eggs, and *en liasse* maybe with the Stats Canada from
food consumption for two thousand (2000).

LA COUR:

5

Très bien. Les deux (2), *en liasse*.

Me MAURICE REGNIER:

247 Q- At paragraph 32 of your report, you mention that:

"A large number of studies in such
areas have been completed by
Government departments, academics and
others to test for the effect of
advertising on total consumption and
on inter-industry demand."

10

I'm showing you, sir, the United States report of 15
the Surgeon General for the year nineteen ninety-four
(1994). Are you familiar with this report?

A- No, I'm not.

248 Q- You would not consider appropriate to review this
report before preparing your expert report before the 20
Court?

A- I looked through the advertising literature, where
information of this kind usually appears. I did not
look through the medical literature. I regard the

kinds of economists and advertising people that write in the advertising literature as the kinds of area where one would look for information and I simply used the databases that I have to look in those areas, so I'm afraid the Surgeon General's report escaped my 5 attention.

249 Q- Well, isn't the United States Surgeon General part of the US Government?

A- I have no idea of the precise link between the Surgeon General and the US Government, but I presume it's some 10 sort of an official post.

250 Q- Well, the suggested citation for the US Surgeon General's report is US Department of Health and Human Services.

A- Uh-huh. 15

251 Q- Would that help you?

A- I presume, as I said, that it is a part... that he is some sort of an official post.

252 Q- So let's have a look at his report.

Me DOUGLAS MITCHELL: 20

My Lord, the witness hasn't read it and hasn't recognized that it's... that is the end of it in cross-examination. Again, I don't see the point of putting a four-hundred-page (400) document again to a witness who hasn't read the document. 25

LA COUR:

Maître.

Me MAURICE REGNIER:

Bon, Votre Seigneurie, je pense c'est important 5
peut-être de savoir qu'est-ce que le témoin aurait pu
voir, n'a pas vu ou aurait dû voir.

LA COUR:

Sous réserve. Allez-y. Quant à la production du
document, on n'est pas rendu là, je verrai. Je présume 10
que vous aurez à déposer ce document-là par quelqu'un
d'autre un de ces jours?

Me MAURICE REGNIER:

Votre Seigneurie...

LA COUR:

15

Ou si c'est...

Me MAURICE REGNIER:

... les documents, les rapports du Chirurgien
général, à moins que je fasse témoigner le *Surgeon*
General lui-même, fait partie de ce qu'on appelle la 20
preuve extrinsèque, ils sont là. Il n'y a pas d'autre
façon... ce sont des documents qui font autorité.

LA COUR:

La question étant est-ce que vous allez le...

Me MAURICE REGNIER:

La Cour suprême...

LA COUR:

... vous allez y faire référence avec un autre...

Me MAURICE REGNIER:

5

Oui, la réponse c'est oui, abondamment, Votre
Seigneurie.

LA COUR:

... avec un autre témoin?

Me MAURICE REGNIER:

10

Abondamment, et...

LA COUR:

Avec un autre témoin?

Me MAURICE REGNIER:

Oui, oui, il y a d'autres témoins qui vont... 15

LA COUR:

Correct, très bien. Alors, donc, il sera
probablement produit à ce moment-là, à moins qu'il n'y
ait pas d'objection qu'on le produise tout de suite.
Alors, mais pour l'instant, vous pouvez poser vos 20
questions.

Me MAURICE REGNIER:

Merci.

LA COUR:

25

Sous réserve de l'objection générale de maître
Mitchell.

Me MAURICE REGNIER:

253 Q- Now, isn't it a fact that the Surgeon General's report
is not only about medical issues. 5

Me SIMON POTTER:

The witness has just said he hasn't read this
thing, he can't possibly answer the question.

Me MAURICE REGNIER:

254 Q- So would you please turn to page 157. Isn't it a fact 10
that this paragraph, sir, deals with questions that
should normally be of the utmost interest to you?

A- And this is a medical report, I presume, which touches
on tobacco advertising. There are presumably many such
reports in the world, one can't read them all. I have 15
simply read or tried to read the relevant professional
literature in the advertising area as opposed to in the
medical area.

255 Q- Isn't it a fact, sir, that this report deals with, for
example, at page 170 of self-regulatory cigarette 20
advertising codes?

Me SIMON POTTER:

My Lord, this is not the domain of this witness
to say what this document deals with that he has never
read. 25

Me MAURICE REGNIER:

256 Q- Well, would you please turn to page 174, sir, which deals with your theory of the maturity of the cigarette market. If you look at the right column, third paragraph, starting,

"Advertising textbooks counsel that even when faced with so-called mature markets, advertising firms can and often should attempt both to increase usage among existing customers and to address potential new users."

5

10

Do you agree with this statement, sir?

A- It depends entirely on the area that you're talking about. As I have already said, I believe that in the car market, for example, car companies do not address 15 young people and suggest that they should become car users. It would be rather fatuous to do so. Everybody or most people wish to become car users and to suggest you have to kind of get more car users in the pipeline, I don't... I simply don't believe it reflects reality 20 in the way it works in the real world.

257 Q- Would you please turn to page 175, which deals with contemporary strategies of the tobacco industry. The section concerning researching the young makes

references to Canadian documents coming from Plaintiffs, which were cited and which were used in the first trial. Are you familiar with the documents listed in this section?

A- No, I have... I have not read the background material, 5
I have only testified on my expertise and my knowledge and I certainly haven't attempted to plough through the very considerable literature behind it.

258 Q- Are you familiar with ITL's Project Huron?

A- No. 10

259 Q- With ITL's Project 16?

A- No.

260 Q- With ITL's Project Plus/Minus?

A- No.

261 Q- With RJ Reynolds Macdonald Youth Target Study 87? 15

A- No.

262 Q- Are you aware of any documents from the Canadian tobacco industry which would deal with the topic of researching the young?

A- From the Canadian tobacco industry, no, not at all 20

263 Q- At page 176, are you aware of any Canadian advertisements *Portraying Youthful Behaviour*?

A- You showed me an advertisement this morning which had a young person or a youngish person in the picture, but

apart from that, I haven't made a study of Canadian tobacco advertisements at all.

264 Q- Have you ever seen in your lifetime, sir, tobacco advertisements *Conveying Pictures of Health*?

A- Very few UK tobacco advertisements that I remember 5
seeing have conveyed pictures of health, most of the ones that I remember over the past ten (10) or fifteen (15) years or so have been quite indecipherable to anyone but a smoker.

265 Q- At page 176, the Surgeon General makes reference to 10
advertisements *Projecting Images of Independence*. Have you ever seen such advertisements in your career, sir?

A- I'm not sure what an image of independence would be, I'm afraid. I don't really understand the question.

266 Q- Well, if you look at page 177, they give you an example 15
from a document from R.J. Reynolds Export 'A', first paragraph on the top.

"Very young starter smokers choose Export 'A' because it provides them with an instant badge of masculinity, appeals to their rebellious nature and establishes their position amongst their peers."

20

Is that something which...

Me DOUGLAS MITCHELL:

My Lord, I'm just going to intervene at this point because this is a precise example of why these documents are not reliable, because the actual document, which was produced in the last case, says,⁵

"It is hypothesized that very young starter smokers..."

It goes on to conclude that,

"Since we cannot target our creative nor advertising to starter smokers, we are not going to do it."

10

So when you read extracts from a document to a witness who knows nothing about the document, all you're doing is inducing the Court into error, and that's why it's an improper use of this document with ¹⁵ this witness.

Me MAURICE REGNIER:

Votre Seigneurie, le but de l'exercice n'est pas de démontrer si RJR le fait ou non. Ce passage-là est intéressant parce qu'il décrit de quelle manière les ²⁰ compagnies, comment est-ce... de quelle manière les images d'indépendance peuvent être projetées. C'est à ce niveau-là, on n'accuse pas... je n'accuse pas RJR Macdonald ou JTI-Macdonald de faire un exercice

semblable pour le moment.

C'est simplement dans le but de l'exercice de...
On se rattache toujours à l'utilisation, à la
définition de "*lifestyle*" qui est contenue dans la loi.
Alors, c'est le but de l'exercice mais je n'insiste pas 5
oultre mesure.

267 Q- Have you read, sir, the...

LA COUR:

Je vous donnerai vos copies.

Me SIMON POTTER:

10

What was the year of that report?

Me DOUGLAS MITCHELL:

Ninety-four ('94). Est-ce que je le garde là, je
présume qu'il va revenir?

Me MAURICE REGNIER:

15

268 Q- Paragraph 25 of your report...

Me DOUGLAS MITCHELL:

So, which paragraph, sorry?

Me MAURICE REGNIER:

25.

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Me DOUGLAS MITCHELL:

25, thank you.

Me MAURICE REGNIER:

269 Q- It says that there is no evidence whatsoever of
manufacturers colluding in any way to increase market
sizes via brand advertising, other than through
occasional outbreaks of generic advertising case
histories rarely even referred to the possibility. 5
Now, practically speaking, isn't it a fact that, or
have you read the RJR Macdonald nineteen ninety-five
(1995) Supreme Court decision?

A- No.

270 Q- You haven't. 10

A- No.

271 Q- Did you ask Plaintiffs to provide you with their
marketing documents?

A- No. In order to provide evidence for this question, I
arranged for a complete analysis of the... more than 15
two and a half (2½) thousand, I think, at that
particular point in time cases that were on the world
database. I think we discovered, out of that two and
a half (2½) thousand, mentions of strategies to
increase total market size and no more than three (3) 20
or four (4) cases, one of the cases where the
possibility of increasing the total market was
mentioned, I remember, was the... a mouthwash campaign,
where I believe the company was Listerine, had
something like eighty (80) or ninety percent (90%) of 25

the total market.

So, from their point of view, their market share was almost the total market and their strategy was obviously, because they had so much of the market, their strategy was to increase the size of the market. 5 Whether they succeeded or not, I don't know. But there were, in all of these thousands of case histories, a very, very tiny number of case histories where the possibility of increasing total market size was mentioned. In the vast majority of cases and that is 10 over ninety-nine percent (99%) of cases, there was no mention of trying to go for market size. The companies involved were simply trying to expand their market shares, which is why I say the case histories, and that perhaps I should have said case histories that were 15 available to me through the world database, which is the biggest one in the world of its kind. The case histories available to me rarely ever refer even to the possibility of increasing market size.

So, that is and was the evidence available to me 20 and I believe very strongly that the vast majority of companies and brands try to increase their market share and never even think about the possibility of expanding the total market for smoking, or drinking, or buying cars, or any other such thing and I believe that's 25

simply through reflection of how people marketing brands act.

272 Q- Well, have you read, sir, the nineteen ninety-five
(1995) Canadian Supreme Court decision, you would have
a very good example of such case of manufacturers 5
trying to increase market sizes.

Me SIMON POTTER:

Is there a question, My Lord?

Me MAURICE REGNIER:

No.

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Me SIMON POTTER:

I see.

THE COURT:

No objection?

Me MAURICE REGNIER:

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But just for... it's intellectual curiosity.

273 Q- Paragraph 30, you say that there are many available
studies that indicate that even very large... indicate
that even very large increases in brand preference
advertising have no impact on aggregate or total demand 20
for the products in question. Are you familiar, sir,
with the work of Henry Saffer and Frank Chaloupka?
A- I think you could well be referring to an NBER paper,
from memory, which I believe was a private paper
produced by the NBER, not an actual published one. 25

- 274 Q- Well, sir, I have a paper here by Henry Saffer and Frank Chaloupka, entitled: "*The effect of advertising bans on tobacco consumption*", published in the *Journal of Health Economics* in two thousand (2000). Are you familiar with this document? 5
- A- I am not familiar with this document, I'm afraid. But it could be a development of one that I saw earlier.
- 275 Q- Well, would you please...
- A- Only the..., I don't know this one.
- 276 Q- And tell us if you feel comfortable enough to testify 10 on this document?
- A- No, I haven't seen this document.
- 277 Q- Coming back, briefly, to Table 1, sir, which was Exhibit P-36, as Canada is concerned, reference to TPCA, you made a reference to TPCA 91 and 95 and 15 tobacco, TA, *Tobacco Act*, nineteen ninety-seven (1997). Would you please explain to the Court exactly to what figure you're making reference?
- A- I didn't make those references, I'm afraid. They were not on the original documentation I prepared. I 20 believe they were made by... they were added by the lawyers for the benefit of the Court. But I don't actually know what they mean.
- 278 Q- Well, you told us yesterday, sir, that this paper was

produced in answer to a question, a demand by the Court that you indicate beside every country that - may I finish? - that you indicate beside every country those which were... which would have a ban or restrictions.

Am I correct?

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Me SIMON POTTER:

My Lord, allow me to intervene. It was, in fact, I who put those and it was in order to avoid having a witness prejudge a question which will be before the Court. The witness did mention the other countries as 10 countries which he considered, because of the WHO document, to have a ban. He, the witness, put Canada in that list but did not mention whether they had a ban or not. And in order to leave the question unprejudged and unbiased in the mind of the witness, I simply chose 15 to indicate that there had been, in Canada, the *Tobacco Products Control Act*. And there has been, in Canada, the *Tobacco Act*. Leaving the question unprejudged, I thought that was the only fair thing to do.

20

Me MAURICE REGNIER:

I was under the impression, My Lord, that this paper was prepared and these annotations were prepared by the witness, when I asked him a question about the

source of these indications, he never mentioned to us
that this came from his lawyer.

Me SIMON POTTER:

My Lord, that is misstating exactly what I've
just said. All the other indications do, indeed, come 5
from Mr. Waterson's review of the WHO as he testified
to, and as he testified with those dates. I have just
explained where the TPCA and TA references come through
and it is not correct to misstate the source of these
numbers, or Mr. Waterson's involvement in them. 10

Me MAURICE REGNIER:

279 Q- Now, I believe that you agree with your lawyer's
statement that there was a ban in Canada between
nineteen ninety-one (1991) and nineteen ninety-five
(1995) and since nineteen ninety-seven (1997), is that 15
so?

Me SIMON POTTER:

My Lord, that is exactly what I was careful not
to say.

20

Me MAURICE REGNIER:

Well, you didn't say anything yesterday.

Me SIMON POTTER:

I was careful to say that I put these on there so
as not to prejudge the issue as to whether there was a 25

total ban or not to leave the question unanswered, and without giving my answer as to whether there was a total ban or not. So, once again, I'm afraid I've been misstated, misquoted.

Me MAURICE REGNIER:

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280 Q- I will help you. I will help you and I will help your lawyer, sir. I'm showing you a letter by Simon Potter to the Secretary of State for Health dated January twenty-seven (27), nineteen ninety-three (1993).

THE COURT:

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Was it the Simon Potter?

Me MAURICE REGNIER:

It's the Simon Potter.

Me DOUGLAS MITCHELL:

Or Potter.

15

Me MAURICE REGNIER:

281 Q- Well, first of all, sir, this letter makes reference to a document called the Smee Report. Would you please explain to the Court what the Smee Report is?

A- The Smee Report was a report produced by, I believe, 20 the Department of Health in the UK some years ago containing many many factual inaccuracies which were subsequently rectified.

282 Q- Now, if you turn, there's a second letter to the first

letter. Just turn to the second letter to Mr. K. Leany, Economics and Operational Research Division, Department of Health. At page 2 of this document, second to last paragraph, I believe you had the opportunity to review the Smee Report?

5

A- I did produce a number of comments on the Smee Report at the time, yes.

283 Q- Now, second to last paragraph, Mr. Potter writes:

"At page 19, the Smee Report contends that the TPCA's ad ban was tight, wide-ranging, and large and immediate."

10

Mr. Potter says:

"This is clearly wrong, and this error has a clear effect on the conclusions which follow."

15

He continues:

"The Act came into force on January 1st, 1989. Its only immediate effect was on Canadian advertising of Canadian tobacco products in Canadian periodicals. It has had and can have no effect on any advertising seen in foreign periodicals, specifically

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exempted by the Act, though that advertising represented a very large percentage of all advertising seen by Canadians in periodicals. It did not do away with billboard advertising until the beginning of 1991. In-store advertising was not set to disappear until January 1st, 1993, and that disappearance was postponed two (2) weeks by the Québec Court of Appeal's decision last December that it would be unjust to require the dismantling of such advertising while that Court's judgment on the validity of the Act is pending. That is Canadians have seen a good deal of tobacco advertising since the advent of the Act and will, even were the Act valid, continue to see a good deal of overflow advertising."

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Now, reading that, sir, would you please... do you think it would be necessary for you to modify the indication appearing on Table 1 of P-36?

A- I had put no indication other than a question mark on Table 1, and I would still leave it to others better

25

qualified than I to decide whether or not there is an
advertising ban in Canada. I simply don't know.
According to this letter, there seems to be some
question that it was not an advertising ban in the
sense that foreign publications were allowed. So there 5
is obviously some question mark about what one would
call a ban in this case.

LA COUR:

Peut-être avons-nous un problème que j'ai causé
moi-même. Je m'adresse aux deux (2) procureurs. J'ai 10
demandé hier effectivement, puisque monsieur témoignait
sur certains pays où il y avait eu interdiction de
publicité, d'autres non, j'ai cru qu'il existait un
document sur lequel les parties s'entendaient. Et la
première chose qui m'a frappé, évidemment, c'est que 15
"ban" n'est pas défini.

Alors, je suis un peu pris, je vous avoue, avec
un document que j'ai moi-même demandé. Si le document
nous nuit plus qu'il nous aide, là...

Me MAURICE REGNIER:

20

Je pense que la Cour doit se sentir à l'aise,
parce que, effectivement, je pense que c'est simplement
un exercice, Votre Seigneurie, pour montrer la
complexité de la situation. L'exercice que l'on fait

ne va plus loin que ça. C'est pour montrer la complexité de la situation et les faiblesses et limites de la Table 1. Alors, c'est...

LA COUR:

On s'entend bien, maître Potter, pour dire que 5
dans le document que vous m'avez remis, "*ban*" n'est pas défini?

Me SIMON POTTER:

Absolument, tout le monde s'entend. Et je m'accorde avec maître Régnier pour dire que vous, Votre 10
Seigneurie, vous devriez vous sentir tout à fait à l'aise. Le mot "*ban*" n'est pas défini. L'utilisation du mot "*ban*", le témoin a expliqué qu'il a pris ça d'un document WHO. Et j'ai expliqué qu'en ce qui concerne le Canada, j'ai fait exprès pour ne pas me servir du 15
terme en donnant ce tableau, mais il m'a semblé que c'était la chose juste d'indiquer que, pour ce qui était du Canada, il y avait une question, et c'est à dessein que j'ai choisi la date mil neuf cent quatre-vingt-onze (1991) qui paraît là-dessus. 20

LA COUR:

Bien.

Me MAURICE REGNIER:

Alors, j'aimerais produire, Votre Seigneurie, ces

deux (2) lettres sous D-56.

Me SIMON POTTER:

My Lord, I have no trouble with letters that I have signed becoming exhibits in this case. I have no qualm or quarrel with this particular letter. However, 5 the witness here is Mr. Waterson and we will be here for six (6) more weeks if Mr. Waterson is asked to sign letters that he's never seen, never drafted, never read, and they're simply put to him for signing, whether they're signed by me or by someone else. 10

This document should not be produced by this witness. There may be another witness who can do it or perhaps Mr. Régnier would like to call me during the case, I don't know, but it should not be Mr. Waterson.

Me MAURICE REGNIER:

15

Si vous m'y invitez, maître Potter, je demande justement qu'il soit produit pour éviter qu'on fasse ça. Alors, je le fais par gentillesse pour vous.

LA COUR:

Est-ce que ce n'est pas monsieur Ricard, 20 j'imagine?

Me MAURICE REGNIER:

Mais monsieur Ricard n'est pas l'auteur de cette lettre. Alors, il suffirait que je veuille faire déposer ça par monsieur Ricard, et là, maître Potter va 25

s'opposer.

Alors, maître Potter, ou on le produit ou vous
serez notre premier témoin.

LA COUR:

Vous référez à quel autre témoin qui pourrait le 5
déposer de façon plus convaincante?

Me MAURICE REGNIER:

Je pense, Votre Seigneurie, qu'on pourrait le
produire de consentement.

Me SIMON POTTER:

10

Fine. Let's just file it and get it over with.

LA COUR:

Pour faire plaisir à maître Régnier.

Me SIMON POTTER:

On va peut-être faire plaisir à maître Régnier 15

LA COUR:

Alors, notez au procès-verbal que nous allons...

LA GREFFIERE:

En liasse?

LA COUR:

20

Non, c'est juste un autre, ça. Il est déjà
déposé. Oui, en liasse, vous avez raison. Il y a deux
(2) lettres, hein? Il y a deux (2) lettres, oui. Yes?

Me MAURICE REGNIER:

284 Q- Now, let's go to paragraph 28 of your report. 25

THE COURT:

Sorry, what section?

Me MAURICE REGNIER:

48.

285 Q- It states that:

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*"The contrast is particularly sharp
between countries, such as Norway,
which have gone to extreme lengths to
stop tobacco advertising, and the UK"*

10

Just to make things clear, I believe that the situation in UK is summarily the following, and you'll correct me if I'm wrong. I believe that there's a... any form of advertising is allowed, as long as it's not on television, and that there's a code of practice that 15 prohibits certain kinds of advertising, a voluntary code of practice.

A- I'm not sure that is entirely correct. I believe that there is no cigarette advertising on the radio either. I think it is a broadcast ban in... I think a broadcast 20 ban would probably be a better description of the situation. Certainly one can advertise cigarettes in the press and, I believe, on billboards.

286 Q- You testified before the House of Commons Committee in

nineteen eighty-seven (1987), this is Exhibit D-33.
You said, at page 24821,

*"I would suggest that if this
Committee wishes to cut cigarette
smoking in Canada, it would be wiser
to adopt the UK as a role model rather
than Norway. In the UK, actual
cigarette sales are down around 30%.
In Norway, even putting the most
favourable possible construction on
the interpretation of data, sales are
down only 3%."*

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Me SIMON POTTER:

Could I ask, My Lord, that the document from
which Maître Régnier is reading be put before the
witness...

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Me MAURICE REGNIER:

C'est la pièce D...

Me SIMON POTTER:

... so that he could see...

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Me CLAUDE JOYAL:

D-33.

Me MAURICE REGNIER:

... D-33.

A- Thank you. The question?

287 Q- The question, well, do you remember these words?

A- It was, again, quite a few years ago and I'm afraid I don't remember them at all, but on the other hand, if this is an official document, I'm sure it's a reasonable transcript of what I said. 5

288 Q- It is. Are you aware of the fact that the UK Health Select Committee reviewed extensively the advertising practice in UK in a report that was issued quite recently? 10

A- No, I'm not.

289 Q- I'm showing you here the Health Second Report. Are you sure you never saw this document?

A- As I made clear to the Court, I'm not an expert on health matters or on tobacco. It's a long time since I have testified in any way on tobacco issues and I certainly don't follow tobacco issues through the House of Commons in the UK or indeed anywhere else. 15

290 Q- Well, you are not testifying, sir, on the tobacco issues and appearing as an expert before this Court, so I'm a bit surprised because I thought that you made a thorough exercise as to inform the Court of what was the actual situation about advertising tobacco. 20

A- I wouldn't regard a House of Commons Committee as necessarily a good source of information on the impact 25

of advertising on markets, which I believe is the main point of my testimony and, therefore, I simply didn't believe it was necessary or indeed important to look at these things.

I do believe that the situation between the UK 5
and Norway is crystal-clear and there is very strong evidence that young people are smoking more in Norway than they are in the UK despite the total ban on advertising in Norway and the absence of a ban in the UK, and I believe those facts speak for themselves.10

291 Q- If you go to the first yellow tab.

J'ai mis des petits *tabs* jaunes parce que le document n'est pas paginé... enfin, très bizarrement paginé.

LA COUR:

15

Pagné à droite.

Me MAURICE REGNIER:

Oui, et par section.

292 Q- That's the section "*Measures against smoking, Measures to restrict marketing*". We have the conclusions of the 20
Committee at the second yellow tab, at paragraph 88, which reads,

"The evidence we have reviewed from the advertising agencies leads us to

*conclude that once more voluntary
agreements have served the industry
well and the public badly.
Regulations have been seen as hurdles
to be overcome or sidestepped.
Legislation banning advertising as a
challenge, a policy to systematically
undermine by whatever means possible."*

5

And then, they recommend that any future relation of
marketing should be statutory. Are you familiar 10
with... have you ever heard such a statement about
the...

A- I have never... I have been part of the Advertising
Association Council for many many years where these
issues are sometimes discussed and I have never heard 15
anyone refer to the Voluntary Control System in the UK
in this manner. On the contrary, I believe that the UK
Voluntary Control System is in fact very highly
regarded by Government. The Department of Health, of
course, is not the Government. 20

293 Q- Paragraph 89 deals with your argument about the mature
market, it reads that,

*"Most of the tobacco companies that
challenge the Government's commitment*

to introduce an advertising ban in advance of the date for implementation set by the EU directive. The argument they have repeatedly advanced is that tobacco advertising does not increase consumption, it merely persuades smokers to switch brands. However, looking through the documents that the agencies themselves produced, this view is completely discredited."

5

10

Were you made aware of such a statement, sir?

A- I have no idea that this sort of statement to be made, and I would find it difficult to believe.

294 Q- Are you aware of the UK Government's response to this document?

15

A- I am not, I'm afraid.

295 Q- Are you aware whether the UK Government in any manner responded to this document?

A- I am not aware of any response to this document whatsoever.

20

296 Q- J'aimerais, Votre Seigneurie, produire ce document sous...

LA GREFFIERE:

D-57.

Me SIMON POTTER:

Je m'objecte, Votre Seigneurie. Quand on prend ce document, d'abord, le témoin ne l'a jamais lu; le témoin vous dit tout de suite, là, qu'il n'a aucune confiance dans la source de cette affaire-là; le témoin 5 vous dit que Department of Health, ce n'est pas le gouvernement même et ce serait tout à fait comme si Santé Canada venait vous dire ses points de vue tout simplement, mais Santé Canada n'est pas ici, le Département de santé de l'Angleterre n'est pas ici non 10 plus, c'est l'expert Waterson qui est là.

En plus, si on prend ce document, Votre Seigneurie, et vous regardez en bas de page, vous verrez qu'en tournant les pages, c'est une collection, c'est une... on a colligé tout simplement toutes sortes 15 de documents ensemble. On voit en bas "Page 1 of 4", puis ensuite "Page 1 of 7", ensuite "Page 8 of 15", ensuite "6 of 8", "5 of 10". C'est une collection, on ne sait pas d'où ça vient, qui l'a fait. Ce serait injuste de permettre que ce document se retrouve dans 20 le dossier de la Cour.

Me MAURICE REGNIER:

Alors, Votre Seigneurie, si je peux répondre. Je l'ai sorti de l'Internet, directement du site du

ministère de la Santé, du comité... Select Committee on Health. C'est un document officiel de la Chambre des Communes anglaise, c'est un document qui fait exactement preuve extrinsèque, c'est un document qui est fiable. Le document est divisé par section et il 5 fallait le télécharger par section, c'est ce qui explique pourquoi la pagination n'est pas continue.

Il n'y a pas d'autre façon, Votre Seigneurie, d'introduire ce document-là devant la Cour. On ne peut pas faire témoigner les membres du Health Select 10 Committee. Ce sont des documents auxquels la Cour suprême... c'est un exemple de documents auxquels la Cour suprême a référé. Il fait preuve, Votre Seigneurie, du contexte général. C'est le témoin qui veut faire, si on se fiait au témoignage de monsieur 15 Engle et aux déclarations de monsieur Waterson devant la Chambre des Communes, qui veut... ils veulent vanter le système volontaire.

On a vu que RBH demande que ce système volontaire devienne loi. Alors, c'est important, Votre 20 Seigneurie, ça démontre le contexte et nous nous permettons d'insister.

LA COUR:

Montrez-moi où la Cour suprême fait référence à ce document.

25

Me MAURICE REGNIER:

Non, pas à ce document-là, Votre Seigneurie, à ce
genre de documents, à des documents de cette nature.

LA COUR:

Donnez-moi un exemple.

5

Me MAURICE REGNIER:

Oui.

LA COUR:

Ou sur une question de... où on fait un énoncé de
principe sur les documents.

10

Me CLAUDE JOYAL:

Est-ce que la Cour m'accorderait peut-être dix
(10) minutes, le temps que je mette mes idées ensemble
là, parce que ça couvre quand même...

LA COUR:

15

Ah! il y a une objection à la production de ce
document-là, maître?

Me SIMON POTTER:

Oui. Il y a l'objection que je viens
d'expliquer, mais pour aider maître Joyal, pour que la
réflexion porte sur la bonne objection, je n'aurai
probablement pas d'objection plus tard, dans un autre
contexte, si maître Régnier veut annexer ça à un
argument éventuel. Mais par ce témoin-ci, c'est
injuste de faire produire ce document-là.

25

LA COUR:

Objection maintenue.

Me CLAUDE JOYAL:

J'aurais peut-être une suggestion à faire.

LA COUR:

5

Oui, bien, on s'entend sur...

Me CLAUDE JOYAL:

Juste avant l'ajournement.

LA COUR:

On s'entend.

10

Me CLAUDE JOYAL:

Pour que maître Potter y réfléchisse. Dans un document soulevant la constitutionnalité d'une disposition législative, la Cour est confrontée à examiner un problème social. Bien souvent, les outils 15 ou la preuve qui va être devant la Cour, ça va être quoi? Ça va être les débats parlementaires, soit le Hansard qui est un document authentique, d'après mon Code civil, tel que je le connais, c'est un document officiel qui émane du gouvernement. 20

Je comprends, par ailleurs, que maître Potter insiste pour avoir la version du Hansard plutôt que la version sur Internet, et on va lui fournir. Mais ceci étant dit, lorsque se pose devant la Cour un problème qui débat ce que j'appelle, moi, des frontières 25

canadiennes, vous allez être confronté avec des documents comme ceux-là qui émanent de l'étranger, qui ne font pas nécessairement preuve de toutes les conclusions factuelles.

LA COUR:

5

C'est ça, je pense qu'on parle peut-être de la même chose. Maître Potter dit qu'il ne s'opposera pas à une plaidoirie ou à la production de ce document-là. Il ne veut pas... il ne voudrait pas le lier sur le champ.

10

Me CLAUDE JOYAL:

Bon, alors, lorsque monsieur Waterson aura terminé de témoigner, on l'introduira en preuve.

LA COUR:

Vous allez vous parler.

15

Me CLAUDE JOYAL:

De consentement. Et, comme ça, les autres témoins pourront y référer.

Me SIMON POTTER:

Bien, ça, Votre Seigneurie, il y a une façon de 20
faire les choses: a brand ice-brief, une preuve
extrinsèque et une façon de le faire. On ne fait pas,
toutes les journées, une addition dans le pot de
documents, brand ice-brief, ou dans le pot de preuves
extrinsèques. Le gouvernement, le procureur général, 25

quand il voudra faire le dépôt d'une documentation qui appuiera un argument sans être appuyer lui-même par un témoin, il le fera en bonne et due forme.

Me DOUGLAS MITCHELL:

Le seul point que j'aimerais ajouter à ceci c'est 5
que je crois qu'il serait important, Monsieur le Juge,
qu'il soit... qu'il y ait une définition de ce qui est
déposé comme preuve extrinsèque dans le dossier et
qu'il y ait une preuve, une distinction de la preuve
qui est déposée pour prouver le contenu même du 10
document et les affirmations qui seront faites. Le but
de la preuve extrinsèque est différent d'une preuve des
faits adjudicatifs qui sont faits avec des témoins.

Donc, je crois qu'il serait très important qu'il
y ait une distinction et la preuve extrinsèque pour 15
faire la preuve du *background*, du contenu factuel,
contexte factuel, c'est permis. Mais pour contredire
un témoin, ce n'est pas permis.

LA COUR:

Pour l'heure, l'objection est maintenue. Vous 20
vous parlerez pour le reste et vous ferez selon ce que
la... les enseignements de la Cour suprême ou de la
Cour d'appel, ou de cette Cour. Bien. Pause de quinze
(15) minutes.

297 Q- A short recess, sir.

SHORT BREAK

Me CLAUDE JOYAL:

5

Avec votre permission, Monsieur le Juge, je vais prendre deux (2) minutes. Je vais vous remettre mon exemplaire du jugement de la Cour suprême.

LA COUR:

C'est à quelle page?

10

Me CLAUDE JOYAL:

Je vais reprendre mon exemplaire, si vous avez le vôtre.

LA COUR:

Oui, oui, je l'ai.

15

Me CLAUDE JOYAL:

C'est à la page 218.

LA COUR:

218. Bon, je vais me servir de cette copie-là tout le long du procès, je voudrais bien la souligner moi-même. 20

Me CLAUDE JOYAL:

Ce que je dis c'est ceci: On pourra probablement revenir sur cette question-là mais je veux répondre à la question tout de suite, à la Cour. C'est en mil 25

neuf cent quatre-vingt-quatre (1984) que la Cour
suprême a dit, dans l'arrêt *Skapinker* que les tribunaux
devront, et les avocats aussi, nous aussi, devront
développer des nouvelles manières de faire dans les
dossiers de la Charte afin que la Cour puisse obtenir 5
toute l'information utile.

Alors, dans la décision de RJR Macdonald, on cite
sous Doctrine, et ces documents-là avaient été déposés
en preuve par un seul témoin qui avait dit: c'est dans
les archives du ministère de la Santé. Puis on les 10
avait cotés de 1 à 220. Alors, je prends l'exemple:

"Assemblée mondiale de la santé.
Résolution de l'Assemblée mondiale.
Canada, Chambre des communes, comité
permanent de la santé". 15

Alors, c'est un rapport parlementaire. "Canada",
je tourne à la page 219:

"Canada. Débat de la Chambre des
communes.
Canada, Santé et bien-être. Document 20
d'orientation du programme national de
lutte contre le tabagisme".

Je ne vous lis pas tous les titres.

"Canada, Santé et bien-être social,

*direction générale de la Protection de
la santé.*

Bureau de l'épidémiologie.

*Initiative canadienne en matière de
santé et de lutte contre le
tabagisme".*

5

Et il y a d'autres rapports. Par la suite, on
cite ce que j'appelle, moi, des articles:

*"Chapman, Simon, Bill Fitzgerald,
Brand Preference and Advertising
Recall. Commission européenne.
Journal officiel des communautés
européennes".*

10

Je ne pense pas que, dans le premier dossier, il
y a eu un Européen qui est venu déposer les directives
de la Commission européenne. De mémoire, maître
Potter, vous pourriez m'aider là, si je me trompe là.

Me SIMON POTTER:

Non, mais vous *mécromprenez* mon objection, je
suis d'accord avec vous, maître Joyal.

20

Me CLAUDE JOYAL:

Attendez une petite seconde, je n'ai pas terminé.

LA COUR:

Il a ouvert la porte. Allez, je vous écoute.

Me CLAUDE JOYAL:

"Acte préparatoire. Commission
européenne, Journal officiel des
communautés européennes".

5

Alors, le rapport qui est devant vous est un
rapport parlementaire.

"Commission européenne, Journal
officiel des communautés européennes.
Conseil européen.
Journal officiel des communautés
européennes".

10

Et je n'ai pas l'intention de vous lire...

LA COUR:

J'apprécie.

15

Me CLAUDE JOYAL:

... 220 mais il y en a d'autres où on réfère aux
Nations Unies et on réfère à la page 220, en bas, au
rapport du Chirurgien général.

Tout ceci pour vous dire qu'on va déposer, sans 20
témoin, plusieurs documents. Maître Potter ne croit
pas qu'il soit utile qu'on introduise le témoin par
monsieur Waterson, fort bien. Je vais vous demander de
le déposer au début de la preuve de la procureure

générale, sans témoin, comme preuve extrinsèque.

Maintenant, je ne veux pas que mon confrère me dise, après: "Vous auriez dû le déposer par l'entremise de monsieur Waterson qui aurait pu faire des commentaires". Alors, ça a été la raison. 5

LA COUR:

Peut-être pourrez-vous l'envoyer très bientôt et envoyer tout ça. C'est peut-être déjà rendu ou, non?

Me CLAUDE JOYAL: 10

Il y a déjà une liste de preuves extrinsèques qui a été déposée au dossier.

Me MAURICE REGNIER:

Et qui avait fait l'objet d'une objection, on s'était présenté, en mil neuf cent quatre-vingt-dix- 15 sept (1997), à l'automne quatre-vingt-dix-sept ('97), devant madame le juge Grenier, qui nous a, après ça, avec jurisprudence à l'appui, on avait envoyé notre liste. Evidemment, elle va devoir être mise à jour parce que l'évolution, le temps a changé depuis mil 20 neuf cent quatre-vingt-dix-sept (1997), les connaissances en la matière ont évolué. Mais elle nous a renvoyé chez nous en nous disant: "*Bien, écoutez, vous ferez ça au procès*".

Alors, donc, la question est toujours...

LA COUR:

Non, mais elle savait que c'est elle qui se
ferait ça mais vous avez été malchanceux sur...

Me MAURICE REGNIER:

5

Alors, la question, donc, n'a jamais été,
effectivement, comme le disait maître Joyal, tranchée.
Alors, donc, il va falloir qu'on sache quelle est la
position de la partie demanderesse à cet égard-là.

LA COUR:

10

Envoyez une liste mais, peut-être, voulez-vous
que je vous donne des indices de réponse.

Me SIMON POTTER:

Non, nous avons reçu une liste il y a un certain
temps, c'est dans la règle 15. Nous avons demandé, 15
comme d'ailleurs d'autres documents dans la règle 15,
et ça au mois d'août dernier, des copies des documents
qu'on veut ainsi déposer, nous ne les avons toujours
pas.

Me MAURICE REGNIER:

20

Ce n'est pas vrai.

Me SIMON POTTER:

C'est vrai que dans des causes impliquant la
Charte, on peut se servir d'une preuve extrinsèque. Il
y a des règles qui sont développées pour faire ça. 25

Maître Joyal vous a dit que, la dernière fois, un
témoin est venu avec la documentation, et un par un, et
ça a été fait éventuellement de consentement, et tout
cela a été coté. La façon de ne pas le faire, c'est à
chaque jour de déposer un document additionnel et de le 5
faire par monsieur Waterson. C'est ma seule position.

LA COUR:

Donc, votre suggestion est que vous allez vous
rencontrer bientôt et réviser la liste de la preuve
extrinsèque sur laquelle vous allez vous entendre, et 10
je déterminerai du reste.

Me SIMON POTTER:

C'est ça.

LA COUR:

Bien.

15

Me SIMON POTTER:

Exactement.

LA COUR:

Alors, on va... combien de temps encore avec le
témoin? 20

Me MAURICE REGNIER:

298 Q- Very last question, sir.

LA COUR:

On me remet quelque chose... je vous le dis, pas
besoin de me remettre... vous avez peut-être lu dans le 25

journal de ce matin...

Me MAURICE REGNIER:

Est-ce maître Potter?

Me SIMON POTTER:

5

C'est hier, et c'est beaucoup trop gros pour que
ça soit...

LA COUR:

D'autant plus que si c'est le juge - on vient
juste de me le remettre - ça ne me ressemble pas du 10
tout. Non, mais laissez une copie, puisque ça fait
partie maintenant du dossier de la Cour, pour maître
Desrosiers et j'en garde une copie ici pour le témoin.

Me GEORGES THIBAUDEAU

pour la demanderesse JTI-Macdonald:

15

C'est de la preuve extrinsèque.

LA COUR:

C'est de la preuve extrinsèque.

299 Q- You can read English?

A- Yes.

20

Me MAURICE REGNIER:

300 Q- I have a document, sir, which is called a World Bank
Publication, curving the epidemic, governments and the
economics of tobacco control. I have a printout of the
same document but just... because it was quite a task 25

to get the original book. Are you familiar with this document?

A- Not at all.

301 Q- Not at all? Okay, thank you, sir.

Me SIMON POTTER:

5

Do we have a copy?

Me MAURICE REGNIER:

No, he's not familiar with it.

THE COURT:

That's it.

10

Me SIMON POTTER:

Well, that's the end of that? Oh, good.

THE COURT:

It was the first and the last.

Me MAURICE REGNIER:

15

That's the end of all. That's the end.

Me SIMON POTTER:

That was the last question.

Me MAURICE REGNIER:

302 Q- It was the last question. Thank you very much, sir. 20

THE COURT:

Was it? Thank you.

Maître Desrosiers, il ne faut pas oublier, cette fois-ci.

25

CROSS-EXAMINED BY Me JULIE DESROSIERS

on behalf of the Intervenant:

303 Q- Mr. Waterson, I'm coming back to your Table 1, P-36.
I understand from the document that the countries where
I can see the asterisk, a star, are the countries where 5
there's a ban on tobacco, right?

A- You may have a different document. I have a document
simply with the date of the ban after the name of the
country.

304 Q- Oh. 10

A- So perhaps I could see the...

Me DOUGLAS MITCHELL:

Just for the record, the ban on tobacco
advertising, not ban on tobacco.

Me JULIE DESROSIERS: 15

On tobacco advertising.

A- Cigarette advertising, right. Yes, I'm sure this was
taken from this.

305 Q- Okay.

A- So I'm fairly certain it's the same. 20

306 Q- Okay.

A- Yes.

307 Q- When there's no star, it's possible that there are
restrictions on tobacco advertising?

A- That is correct, yes. 25

308 Q- But not a ban completely, a complete ban, right?

A- Whether or not there was a ban, a total ban, was simply recorded from the official WHO documentation that I believe was introduced to the Court yesterday. These aren't my opinions, these are the... these are based on statements in a publication of the World Health Organization. 5

309 Q- And what you took into consideration for the preparation of that table is the cigarette consumption, not the tobacco consumption, right? 10

A- It was whether or not there was a total ban on tobacco... cigarette advertising, I believe. But I think the two (2) things in all cases would be identical, because I can't imagine there being a total ban on cigarette advertising without there being a ban on total tobacco advertising. So I believe the things are undistinguishable. 15

310 Q- Let me rephrase my question. Maybe I was not clear. But all the numbers that we see here, not only the countries with a star, but all the numbers, which you took into consideration to evaluate these numbers is cigarette consumption and not tobacco consumption? 20

A- That is correct, yes.

311 Q- Let's say for instance, and I'm being hypothetical here, there's smuggling in a country that represents 25

twenty-five percent (25%) of tobacco consumption. That would not have been taken into consideration for the preparation of that table, right?

A- Not unless the figures that were prepared by the market research companies from where the data was drawn had 5 taken that into consideration. It is entirely possible, since the figures by Maxwell and others are prepared for the tobacco companies, that some smuggling in some countries, when reasonable data was available, was taken into consideration, but I would believe that 10 in general smuggling would be, since it's unquantifiable by any ordinary means, I would believe that largely it's excluded.

312 Q- It's the case as well that roll-your own cigarettes would not have been included in the numbers that we see 15 in this table?

A- No, as I explained earlier, I believe that the vast majority of tobacco advertising is focused on manufacturing cigarettes and not on other forms of tobacco and, therefore, the most appropriate indicative 20 for the purposes of this particular table was to take manufactured cigarettes.

313 Q- Okay. So, if in one country twenty-five percent (25%), and I'm being hypothetical here, twenty-five percent (25%) of tobacco consumption comes from roll-your own 25

cigarettes, these figures would not have been taken into consideration in this table?

A- That is correct.

314 Q- You testified this morning that the price of a twenty (20) cigarette pack in UK is more or less twelve 5 dollars (\$12.00) Canadian.

Me SIMON POTTER:

I beg your pardon. Objection. That misstates the evidence. The question was, "*Would you be surprised to learn that at Waterloo Station the pack 10 cost five pounds (£ 5)?*" And Mr. Waterson said, "*No, I wouldn't be surprised.*" He did not give his own testimony as to the price.

Me JULIE DESROSIERS:

315 Q- Let me rephrase my question. Do you agree that the 15 price of a twenty (20) cigarette pack in UK is more or less twelve dollars (\$12.00) Canadian?

A- I really don't know, because I don't smoke and, therefore, I don't buy cigarettes, and therefore, I simply have no idea. I do have a vague recollection of 20 somebody saying sometime in the not too distant past that the prices of cigarettes were astronomical these days and that some cigarettes cost five pounds (£ 5), but I really don't know more. That is the vaguest of

impressions. I wouldn't be surprised if it was, and that is as far as I can go, I think.

316 Q- So, price of cigarettes in the UK would be astronomical?

Me SIMON POTTER:

5

Well, My Lord, the witness has said that he heard someone say this one day. He's not an expert on the price of cigarettes today in the UK

Me JULIE DESROSIERS:

317 Q- Mr. Waterson, you testified to the effect that price is 10 a factor that has an influence on consumption.

A- I believe that in most product areas price has a significant impact. A significant price rise will lead to a diminution of consumption, for example.

318 Q- So, a country where cigarettes are very expensive 15 compared to another, that could influence the consumption of cigarettes in that country?

A- If, as we heard yesterday, cigarettes are highly addictive, it might or it might not. If cigarette is not very addictive, then I would imagine that a price 20 height could well have a significant impact on consumption.

319 Q- So it is more likely that consumption in a country where cigarettes are expensive will be lower than in a country where cigarettes are cheap?

25

A- Price relationships are relative. And, therefore, if you have a country where incomes are very high, even a relatively high price may not be such a barrier to smoking as in a country where prices... where incomes are generally low. One would have to take into account price-income relationships to do any kind of analysis such as that properly and to make any proper reason or suggestion. I think that was a step too far. 5

320 Q- I'm coming back to the roll-your own cigarettes. Just to make sure I understand the figures you took into consideration in your table, let's say in a country, as I said to you, twenty-five percent (25%) of the tobacco consumption comes from roll-your own cigarettes during one (1) year and let's say ten (10) years later, all these people smoking roll-your own cigarettes are now buying cigarettes, they don't roll their cigarettes any more. In your table, and we're talking about twenty-five percent (25%) here, in your table, there will be an increase in cigarette consumption of twenty-five percent (25%), right? 10 20

A- From what you said, I believe that that is an appropriate suggestion, yes.

321 Q- When in fact there won't be any increase at all in tobacco consumption?

A- I think most situations will be rather more complicated 25

than that because, of course, we have a continuous movement of people stopping to smoke, and no market is completely rigid in that sense. There is a continuous flow in and out of markets and, therefore, although the *identity* that you propose is a pretty... one, in real 5 life market situation might not be as simple as that.

322 Q- But take the hypothesis the way I present it to you, twenty-five percent (25%) roll-your own switch to buying cigarettes, in your table that would be an increase in cigarette consumption of twenty-five 10 percent (25%)?

A- That is probably true, yes.

323 Q- You testified to the effect that in Norway, ten (10) years ago or fifteen (15) years ago...

Me DOUGLAS MITCHELL:

15

My Lord, I'm just going to interject, where it seems to me I'm hearing what I heard yesterday. I'm hearing the same issues. So far I've noted a question about smuggling, if smuggling wasn't taken in accordance, in your table, would that have affected 20 your decision. Roll-your own and the price is an impact. These are the questions that Maître Régnier dealt with already. I don't, I don't see the purpose of reinventing the wheel and doubling cross-

examination.

THE COURT:

So, be careful. Next question.

Me JULIE DESROSIERS:

324 Q- You testified to the effect, yesterday, and I want to 5
make sure I understood you correctly, that, in Norway,
ten (10) or fifteen (15) years ago, people were rolling
their own cigarettes as of today these people tend to
buy cigarettes. Roll-your own cigarettes, let me put
it this way: Roll-your own cigarettes, in Norway, is 10
a lot less popular these days that it was ten (10)
years ago.

A- I am...

Me SIMON POTTER:

I'm sorry, that is a misstatement again of this 15
witness's testimony. He did not testify to anything of
the kind. He did testify that it's a possibility.

Me JULIE DESROSIERS:

He did not testify to that effect, Your Lordship,
he said... 20

THE COURT:

325 Q- So, give your answer, give your answer.

A- I don't remember, I thought I had disclaimed any kind
of intimate knowledge of the Norwegian tobacco market.
I thought I had made a reference to the effect that 25

twenty-five (25) years ago, in nineteen seventy-five (1975), a significant proportion of the Norwegian tobacco market was taken up by roll-your own cigarettes. And I wasn't aware of any movement since but I would presume part of the increase in manufactured cigarette sales had come from people stopping rolling their own. 5

But I have no detailed knowledge of the Norwegian tobacco market. That wasn't the intention of this table which was simply to present a general cross-sectional analysis of all of the various countries and their manufactured cigarette consumption levels. 10

Me JULIE DESROSIERS:

326 Q- So, what you're saying to this Court is the fact that maybe, in Norway, people switched from roll-your own cigarettes to buying cigarettes, has not been taken in consideration at all in your table? 15

A- No, the table was simply designed as a very simple top level cross-sectional analysis of the kind that economists are prone to do. 20

327 Q- Do you know this book, Mr. Waterson?

A- I do.

328 Q- This book has been prepared by the Advertising Association.

A- It is actually being prepared by my company, NTC 25

Publications.

329 Q- Your company. In this book - and I'm sorry I don't
have any copy because I didn't think I would need it -
but page 30 refers to the price of a cigarette pack in
the UK. 5

A- Uh-huh. Yes.

330 Q- And it says, what does it say about the price of it?

A- Four (4) pounds seventeen (17) pence.

331 Q- Four (4) pounds seventeen (17) pence for?

A- Four (4) pounds one seven (17) pence for a packet of 10
cigarettes, approximately retail price for twenty (20)
cigarettes.

332 Q- So, more or less ten dollars (\$10.00) Canadian?

A- Approximately ten dollars (\$10.00), yes.

333 Q- You refer to Adspend in your report. Do you include in 15
Adspend all advertising or only advertising in certain
locations? What did you include in that?

A- The advertising figures... I'm sorry, which advertising
figures?

334 Q- Adspend. When you use the term in your report. 20

A- Adspend...

335 Q- At the end...

THE COURT:

What section.

Me JULIE DESROSIERS:

25

336 Q- ... of your report. I think it's paragraph 24... 54,
I'm sorry.

A- These figures are taken from a company called Media
Expenditure Analysis Limited whose livelihood is
derived from measuring advertising expenditure. The 5
only advertising expenditure figures it's possible to
measure with precision are on television, radio and the
press, on the cinema, in the newspapers and magazines
and in the press, generally. They don't include
sponsorships, for example, or other, what are called 10
"below the line" forms of advertising.

Me JULIE DESROSIERS:

337 Q- Sponsorship would not be included in Adspend?

A- Sponsorship would not be included in advertising, in
these figures. 15

338 Q- Point-of-sale advertising would not be included in...

A- Point-of-sale advertising, definitely, wouldn't... it
is generally believed to be unmeasurable as an
advertising factor.

339 Q- Coupon discount, that kind of advertising would not be 20
included.

A- Coupons wouldn't be, but I don't... No, coupons, I
believe, wouldn't be, discounts are usually called...
are usually not referred to as promotion, they're
referred to as discount of manufacturers' price and, 25

therefore, is price cuts. There is some dispute about where such things belong in company accounts. But I think, in many cases, major manufacturers refer them as price cuts rather than advertising.

340 Q- Would you agree with me, Mr. Waterson, that some 5
marketing studies conclude that advertising has an effect on consumption?

A- There have been a considerable number of academic studies which have concluded that advertising has an impact on consumption. They're referred to in a 10
considerable number, in the various documents, the ten (10)... the ten (10) documents that monsieur Régnier did not refer to, from the evidence that I've brought forward.

341 Q- But there are experts that are not of the same opinion 15
of you on that matter?

A- There are experts that are not of the same opinion, they tend largely to be academics rather than practising advertising people.

342 Q- Do you know these publications, Mr. Waterson? 20

A- Advertising works, I do, indeed.

343 Q- And you agree with me that this book, or this series of books has been published by one of your companies?

A- Yes, indeed. Not all of them but the most recent ones.

344 Q- Okay. This book reviews the Advertising Effectiveness 25

Awards winners.

A- As I described earlier, they're the Advertising Agency Association giving prizes to their members, yes.

345 Q- Would you agree with me that, I don't know, specially for the most recent years, the Advertising Association has been sponsored of the... this Advertising Effectiveness Award? 5

A- The Advertising Association that I have been involved with, I don't think has anything to do with these awards at all. These are awards given by the Institute of Practitioners in Advertising, which is the Advertising Agency Trade Association. 10

346 Q- And you are not aware of the fact that the Advertising Association has been sponsored, more particularly for the year two thousand (2000), of this award? 15

A- I don't believe the Advertising Association, the body that... the organization that the... the umbrella organization for which I have worked for many years has anything to do with those awards whatsoever. You may be confusing your terminology, I suspect. 20

347 Q- Well, no, I, unfortunately, I brought the wrong book, the other one is in my office. But in the two thousand and one (2001), if I had it, I could show you that the Advertising Association sponsored the award, especially

for that year.

A- I'm...

348 Q- And I can bring the book, Your Lordship,
tomorrow, unfortunately I just realized that.

A- I'm convinced that simply isn't true. I don't believe 5
the Advertising Association of London has ever had
anything whatsoever to do with the Institute of
Practitioners in Advertising Award. I actually believe
it would cause monumental political worries for the
IPA, were the AA to be involved in those awards. 10

So I could be massively wrong, I may have had a
memory default of monumental proportions, but I'm
absolutely sure that that isn't the case.

349 Q- Is it possible that your company, WARC, had sponsored
these awards? 15

A- We, yes, WARC has sponsored the awards, that is true.
Well, we sponsored a table. We bought a table at the
award ceremony, so that the young people we employ
could enjoy themselves, that is true, but that's very
different from the Advertising Association. I did 20
suggest you had made an error in your terminology.

350 Q- It's possible. It really is possible. I would have to
re-check the book, but I remember that your company had
sponsored the awards.

Are you aware of the Lurpak advertising campaign? 25

A- Lurpak, the butter campaign.

351 Q- Butter campaign, yes.

A- No, I'm not. No.

352 Q- You have never studied that advertising campaign or the
results of that campaign? 5

A- No, I haven't.

353 Q- Let me show you this document where Lurpak...

A- Thank you.

354 Q- The Lurpak campaign received an award for the year two
thousand (2000) for its advertising campaign on butter. 10

A- Well, a slight correction, if I may. It's an
advertising campaign for one brand of butter, which is
quite different from an advertising campaign for
butter.

355 Q- Isn't Lurpak a brand? 15

A- Lurpak is a brand. It isn't butter. If I could read
you a little bit of this:

*"After almost forty (40) years at
number 1, Anchor..."*

Which is another butter brand. 20

*"... had been dethroned, and as we
enter the new millennium, Lurpak had
become a hundred million pound
(£ 100,000,000) brand."*

So this is a report of one brand of butter displacing other brands of butter in the nation's favour.

356 Q- I'm drawing your attention to the last paragraph of the editor's summary at page 253:

"Finally, it is shown that the effects of advertising extend beyond the advertised brands to the market as a whole. By increasing Lurpak usage at the expense of margarines and dairy spreads, advertising has stemmed the decline in the butter market."

5

10

And I'm drawing your attention to page 284, "Lessons Learnt":

"2. Advertising works in important indirect ways."

15

I don't want to read all of this, but the last dot in page 284, paragraph 2:

"Advertising has also been shown to stimulate a mature market by stealing back volume from outside the immediate market - in our case from the dairy spreads back into butter."

20

This is something, the effect that that Lurpak

campaign, that you have not taken into consideration in your report, right?

A- Not at all. Lurpak butter and margarines are direct substitute products. You can use them for exactly the same purposes. I don't believe there are any direct substitute products for tobacco as a whole and I believe that this is simply a case of one brand of butter taking market share from products for which the use is identical. In other words, they're called, they're referred to in the marketing business, I think, as spreads, things you spread on toast or on bread. 5 10

These, butter and margarine, I think in all countries where they're marketed, are simply direct substitutes and, therefore, this is simply a case of brand competition. 15

357 Q- How can you say that, Mr. Waterson, with so much certitude if you have not read this document and have not studied that campaign at all?

Me SIMON POTTER:

My Lord, the lawyer asks the witness, presenting a document, and puts very provocative questions hoping to get the desired answer. It is not then possible to quarrel about the undesired answer that comes, just because the witness has managed to read the document in time. 20 25

Me JULIE DESROSIERS:

I'm in cross-examination. I think...

THE COURT:

You may go on. There's no objection, there's no
problem. 5

A- How could I know that butter and margarine are
substitutes, which is the impact of the question? I
think... I believe it's widely understood that butter
and margarine are substitute products. It may be that
Canadians use margarine for different purposes, but in 10
England they're largely used as substitutes.

Me JULIE DESROSIERS:

358 Q- This was not my question, Mr. Waterson. My question
was: How can you say with so much certitude that this 15
campaign addresses only the increase of the butter
market, when Lurpak is certainly a brand of butter and
when you have not analyzed at all the conclusions and
effects of that advertising campaign?

A- No, it says very clearly at the back the Lurpak became 20
a brand leader and displaced Anchor as a... it
displaced the brand that had been the leading brand in
the British market for forty (40) years. I had the
chance, in the very small piece of time I had, to read
that, and that, in conjunction with the fact that 25

Lurpak increased at the expense, direct statement, at the expense of margarine and dairy spreads leads me to the absolute firm conclusion that this is a case history of a brand of butter taking market share from other brands of butter and, indeed, from margarine. 5

It's a very simple situation and I don't think, if I had every word of the case history, if I'd been given the opportunity to read the case history before, I would change my mind one iota.

359 Q- I will file the document as I-3. 10

Are you aware of the Kellogg's Nutri-grain campaign?

A- No.

360 Q- You are not, you say? I just did not understand your... 15

THE COURT:

The answer is no. Different accent.

Me JULIE DESROSIERS:

361 Q- I'm drawing your attention to page 511, the two (2) first paragraphs of the editor's summary. 20

"This paper shows how advertising established Kellogg's franchise in a new market. The success of its first convenience food brand, Nutri-grain,

has proved Kellogg's competence in a snack brand, reached new customers, opened up new distribution channels, and created a platform for future expansion within this market. Within four (4) months of launch, Nutri-grain sales had rocketed to eight million (8,000,000) bars per four (4) weeks, propelling Nutri-grain to leadership of the cereal bar category."

5

10

And so on. And I'm drawing your attention to 524. Is this... and the last paragraph of that section, "Advertising drove trial",

The final advertising objective was to drive trial of the new brand. According to AGB Superpanel, penetration rose to a peak of 20.5% after a year in the market.

15

And the last paragraph of that section "Advertising drove trial",

20

"The advertising also recruited new consumers to the cereal bar category. Sixty per cent of Nutri-Grain's volume came from new buyers to the category

*in the first year, 29% from increased
purchasing among existing cereal bar
buyers and 11% from direct switching."*

It seems, according to this article, that the
campaign has been successful, the advertising campaign 5
has been successful in increasing sales of Nutri-Grain
bars. Is this something that you've taken into
consideration in your report?

A- Nutri-Grain bars are a tiny bit of the food market, My
Lord. The... I have always claimed that advertising at 10
very small levels like this can do all sorts of things,
but if we raise our eyes to the level of major market
categories like food and drink, and tobacco, which my
evidence refers to, these things simply don't happen.
This is a very small category of bars with many 15
different substitute products attached to them. This
is a case of a brand success, a considerable success
for one individual brand in an area of, I believe... I
haven't have been given the opportunity of reading this
case history, but I believe this is in what is called 20
"the snack food" market, in what would be referred to
in most cases in advertising as "the snack food
market", and this is one small brand gaining a lot of
market share of the snack food market.

I think that it would be very difficult to regard this anything other than a brand success, but obviously I would like to be given an opportunity to read this a little bit more.

362 Q- The products you refer to... and I would like to file 5
this as I-4, Madam.

The products that you refer to in your report and that you referred to in your examination in chief, so, toothpaste, food, gasoline, would you agree with me that in a country like Canada, these products are 10
necessary products?

A- Not everybody has to wash, and so it is not necessary in the sense that food is necessary. They are products which everyone knows about and which people use as a matter of course in their daily lives. 15

363 Q- But would you agree with me that... I don't want to talk about the percentage, but almost everybody in a society like Canada would use soap, toothpaste, food and every car driver will use gasoline?

A- Not every car driver uses gasoline in Europe at least 20
because there are other forms of fuel now like liquid gas. I believe it's true, I do believe it's an unfortunate fact that actually only about seventy-five percent (75%) of the population uses toothpaste, which I have always found difficult to believe but I have 25

nevertheless read. It is almost certainly true that most people wash, I think, these days.

364 Q- And most people eat if not all people eat?

A- Most people eat, but they're not obliged to eat Nutri-Grain bars. 5

365 Q- True. Would you agree with me that the case of cigarettes is a bit different and in Canada, there are twenty-three percent (23%) of customers that will smoke tobacco?

A- I am sure if you are quoting that figure, it's a 10 sensible figure, but I have no personal knowledge of it.

366 Q- But do you agree with me that cigarettes is a product that is different in that sense from food, for instance? 15

A- All the various product categories are different. Obviously, gasoline is different from food, alcoholic drink is different from cigarettes, all the main product categories have their own different qualifications. And also I believe that there are 20 great similarities between the drink market and the alcoholic... the alcoholic drink market and the cigarette category in the sense that we have no smokers and we have tea... So there are product categories with which one can make closer comparisons and product 25

categories with which one can make less close comparisons. I don't believe it's sensible to compare the Nutri-Grain bar category with food consumption or with alcohol consumption, or indeed with tobacco consumption.

5

367 Q- Turning back to cigarettes, twenty-three percent (23%)... and you can take that for granted for the purpose of my question, twenty-three percent (23%) of the people in Canada, well, the customers for tobacco. In that situation, there's seventy-seven percent (77%) 10 of the people in Canada are not consuming tobacco. Would you agree with me that out of this seventy-seven percent (77%), there are some people that are potential customers for the tobacco industry, do you agree with that statement? 15

A- There will certainly be young people who become smokers at some point in their lives, so to that extent, yes, I agree with you.

368 Q- And these potential new customers, when they become smokers, they are new customers for the tobacco in 20 industry in general, not only for a brand, right?

A- That is also potentially true, yes.

369 Q- Is it possible, Mr. Waterson, that one or another of these potential new customers might have been influenced by advertising, is it possible, is there a 25

possibility?

A- It is possible, but I believe it's extremely unlikely that the influence of advertising is anything remotely as powerful as for example the old films, TV, and the myriad of other influences that affect young people. 5
For example, we know that people... smokers... the children who have parents who smoke are more likely to become smokers than children who don't. There are many many influences. It is my view that people don't become car drivers because of advertising, they don't 10
become eaters because of food advertising, and they don't become smokers because of cigarette advertising, I don't believe markets work this way.

370 Q- Do you know this document

A- I do know of it. I'm not... 15

371 Q- It's *The British Code of Advertising and Sales Promotion*. So you know this document?

A- I do.

Me SIMON POTTER:

He knows of it. Thank you. 20

Me JULIE DESROSIERS:

372 Q- The Advertising Association is a member of the Committee of Advertising Practice, right? Are you aware of that?

A- I wasn't aware of it, I have never been very closely associated with the Advertising Standards authority, but I can see in front of me that the Advertising Association is indeed a member of the Committee of Advertising Practice. 5

373 Q- And we can see that on page 2 of the document.

A- I can see that, yes.

374 Q- There are provisions to protect children in that code, are you aware of them?

A- Many of the codes of practice now contain rules about 10 advertising to children, yes.

375 Q- There are on page 40 and following. Do you know for how long these provisions regarding children have been in place in the UK?

A- I have no idea, I'm afraid. 15

376 Q- And do you know, according to this code, what age "children" refers to?

A- No, I'm afraid I don't.

377 Q- There are provisions concerning casinos in this code, are you aware of them? 20

A- I wasn't but it doesn't surprise me.

378 Q- On page 63, section 56.6 reads,

*"Licensed casinos can only use
classified advertisements to advertise*

to the public. Such advertisements should be restricted to the name, logo, address, telephone and fax numbers of the premises, factual information about ownership, the facilities provided, those who may be admitted and how to apply for membership."

5

Would you agree with me that this section permits information advertising?

10

A- I don't know of a definition of information advertising as I believe I said earlier virtually everything provides information of some sort. The brass... I think the example I used was of brass plates on legal offices in the UK, the humblest plate provides some information even if only indirectly. This clearly allows advertising restricted to the name, logo, address, et cetera, which is information, so to that extent, I must agree with you.

379 Q- And I guess you wouldn't know for how long these restrictions have been...

20

A- I have no idea, I'm afraid.

380 Q- Turn to page 79, 66.19. These are the sections that are related to tobacco advertising restrictions.

66.19,

"Smoking should not be associated with social, sexual, romantic or business success and advertisements should not be sexually titillating, though the choice of a particular brand may be linked to taste and discernment. In particular, advertisements should not link smoking with people who are evidently wealthy, fashionable, sophisticated or successful or who possess other attributes or qualities that may reasonably be expected to command admiration or encourage emulation."

5

10

15

Would you agree with me that this provision prohibits cigarette advertising associated with certain lifestyle characteristics?

A- This clause prevents people advertising... as it says, you mustn't link smoking with people who are evidently wealthy or fashionable, or indeed successful.

381 Q- Would you agree that we can qualify that as lifestyle characteristics?

A- I don't think in the market researches, those... I have

never seen a categorization that chops people off into those categories. In market researches, as I pointed out earlier, the word "lifestyle" is associated with more humble characteristics like fishing, playing golf, being old, being young, being male, being female. 5 There are no market research categorizations that I know that are used in the industry that divide people into being wealthy, fashionable, sophisticated or successful, so I wouldn't agree.

382 Q- 66.24, 25 and 26,

10

"No advertisement should exaggerate the pleasure of smoking or claim that it is daring or glamorous to smoke or that smoking enhances people's masculinity, femininity, appearance or independence.

15

Advertisements that employ outdoor locations or those that depict people or animals should avoid any suggestion of a healthy or wholesome style of life. Any locations, people and objects depicted should not have undue aspirational, historical or cultural associations.

20

*Advertisements should not associate
smoking with sport or with active or
outdoor games. Advertisements for
sports sponsorship are governed by a
separate, blah-blah-blah..."*

5

Would you agree with me that these sections also
prohibit cigarette advertising associated with a
certain lifestyle characteristic?

A- The use of the word "*lifestyle*" I think is misleading.
I think that people who play games or... I don't 10
believe that advertisements that employ outdoor
locations or those that depict animals for example, I
don't think that would come under any categorization of
lifestyle that I could think of. They are simply
paragraphs that prohibit advertising as they state. I 15
don't think it's easy or possible to put a general
ticket on them. If it was possible, there would simply
be a single phrase saying, "No lifestyle advertising."

383 Q- I want to file that as I-5.

I don't have any further questions.

20

THE COURT:

A few questions?

Me SIMON POTTER:

I only have ten (10) or twelve (12) minutes, My

Lord.

RE-EXAMINED BY Me SIMON POTTER

on behalf of Plaintiff Imperial Tobacco Canada Limited:

384 Q- Mr. Waterson, just that document, so that we can put it 5
away. Whether it's in that document, the *British Codes
of Advertising and Sales Promotion*, or whether it's in
any other British or other code or regulation, are you
aware of prohibitions of advertising which evoke
emotions or images? 10

A- As far as I know, there is no general prohibition of
images or emotions.

385 Q- Now, there's been some discussion of tea and there's
been an exhibit filed D-53. I don't think you need to
get it out, but in answer to Mr. Régnier, you said, if 15
you had your little blue book, you could confirm the
long-term trend. Would you have a look at your little
blue book, which I think Maître Desrosiers had quite
handy, and just confirm to the Court what are the long-
term consumption trends per capita in tea? 20

A- In nineteen... this is in kilograms per head per annum.
In nineteen eighty (1980), the British consumed three
point zero two (3.02) kilograms per head. In nineteen
eighty-five (1985) - these are going five (5) years

intervals - nineteen eighty-five (1985), two point five seven (2.57). Nineteen ninety (1990), two point two three (2.23). Nineteen ninety-six (1996), one point nine eight (1.98). Nineteen ninety-seven (1997), one point eight seven (1.87). Nineteen ninety-eight 5 (1998), one point eight two (1.82). A continuous decline over a twenty (20) year period. And I believe that one can extend that back for a further twenty (20) years.

386 Q- And, Mr. Waterson, in Exhibit D-53, which was shown to 10 you, the very first page, I can see under "*The Effects of Brand Advertising*", the very first sentence is:

"The market is fiercely contested among major brands, namely several brands of tea. Their expenditure 15 apparently does little to support the total market."

Do you agree or disagree with that?

A- I agree completely.

387 Q- There's been some discussion of milk as well, Mr. 20 Waterson, and you were shown Exhibit D-52, and I believe it had to do with an increase of something less than two percent (2%) or about two percent (2%) in the absolute volume of milk sales in Scotland over three

(3) or four (4) years. Are you aware whether the Scottish population went up or down during those years?

A- I imagine it was fairly static, in line with the UK population. It may have increased a little bit, but certainly hasn't fallen very much. 5

388 Q- So, are you able to say whether per capita consumption of milk went up or down during those years?

A- I can say that in the UK as a whole milk consumption fell from one hundred and twenty-one (121) kilograms per head in nineteen eighty (1980) to thirty-four (34) 10 kilograms per head in nineteen ninety-eight (1998). In other words, a very rapid decline, one hundred and twenty-one (121) kilograms per head down to thirty-five (35), thirty-four - thirty-five (34-35) kilograms per head over the twenty (20) year period. And again, the 15 drop was steady and... simply steady and rapid throughout the period.

There were, it must be said, there was an increase in low fat milk consumption, but that in no way compensated for the drop overall. There was a fast 20 and rapid drop in the market throughout the period.

389 Q- And your attention has been drawn to eggs as well, and you were asked to look at Exhibit D-55, which had to do with eggs and which mentioned, as people said to you, a campaign which appeared to have or was said to have 25

some moderate success in nineteen ninety-six - nineteen ninety-seven (1996-1997).

Just looking at the first page of D-55, we see:

"To reverse this decline..."

That they talk about.

5

"... we looked at the problem in an unprecedented way. Despite years of multimillion dollar budgets spent through the national and provincial egg marketing boards, nothing had stemmed the tide. The answer, as we will show, would be found in the grocery store aisle."

10

And they go on. Does that paragraph coincide with your view of what happens in generic markets? 15

A- That is exactly what has happened in the UK market over, again, over a twenty (20) year period. It collapsed in consumption from one hundred ninety-one (191) eggs per person in nineteen eighty (1980) down to a mere ninety (90) eggs per person in nineteen ninety- 20 eight (1998).

390 Q- And if we look at Figure 1 of Exhibit D-55, which shows the graph of annual egg consumption per capita in dozens, which appears to be... anyway, down the

overall, would you say it is a safe or unsafe, is it a prudent or imprudent thing to draw conclusions from the little tiny up chart at the bottom of that downward graph?

A- Well, because the document comes from an advertising agency with a self-interest in the figures, I would conclude that it was in fact neatly unsafe to conclude that long-term egg consumption would continue to rise from now on. However, I would say that the campaign did provide brand new health information to the effect that we can all go out and eat lots of eggs and not worry about our cholesterol any more. And if that is indeed the case, I think it could conceivably affect the market. A major change in information available in a market could change direction of a market like that. 15

391 Q- And, Mr. Waterson, in answer to a question from Mr. Régnier, you made, I believe it was three (3) references to a Saskatchewan study on alcohol as having been used by you to confirm your position. Mr. Régnier did not ask that it be filed, but I wonder, is this the study to which you're referring to? 20

A- That is the study, yes.

392 Q- This is a study called "*Advertising and Alcohol Sales - A Legal Impact Study*" by Makowsky and

Whitehead. I'd like to file that as Exhibit P-37.

The Marcus Grant reference in your, I think it's
footnote 1 in your statement you referred to several
times in answer to Maître Régnier, and is that
reference from this article entitled "*The Moderating* 5
Influence"?

A- That is correct.

393 Q- By Marcus Grant. And Mr. Régnier did not ask
that this be filed, but I ask that it be filed as
Exhibit P-38. 10

Mr. Waterson you repeatedly in your testimony
referred to a WHO document from which you took the
information regarding the existence or non-existence of
a ban, or tantamount to a ban. Is this the document to
which you referred? 15

A- Yes, that is the document.

394 Q- Mr. Régnier did not ask that this be filed, but
I do ask that it be filed as Exhibit P-39. And I
believe my friends already have copies of that
document. We gave copies of that to you yesterday 20

Me MARIE MARMET,
pour la défenderesse:

J'en ai une.

Me SIMON POTTER:

395 Q- Now, you have repeatedly in your statement made reference to another study called "*The European School Survey*" in reference to the question of smoking by youth in Norway. What is that document?

A- This is a document which is a regular survey undertaken 5
by various authorities, notably the Swedish Council for Information on Alcohol and Other Drugs, the Council of Europe Cooperation Group to Combat Drug Abuse and Illicit Trafficking. And when it was press released, it came out under a World Health Organization banner as 10
well. So it comes from groups of people involved in health education.

396 Q- And can you explain to the Court what is the conclusion of that document in relation smoking by youth in Norway? 15

Me MAURICE REGNIER:

Votre Seigneurie, je vais m'objecter. Nous sommes loin de l'objet du contre-interrogatoire, de la réplique. Je ne vois pas en quoi ce rapport-là, qui aurait pu être introduit en preuve principale par le 20
témoin et faire l'objet d'un contre-interrogatoire, est maintenant introduit au niveau de la réponse ou réplique.

Me SIMON POTTER:

Alors, Votre Seigneurie...

Me MAURICE REGNIER:

C'est fondamentalement irrégulier et même injuste
au niveau procédural.

Me SIMON POTTER:

5

Votre Seigneurie, en chef, c'est vrai que
monsieur Waterson n'a pas parlé de la consommation du
tabac par les jeunes en Norvège. Cependant, en contre-
interrogatoire, lorsqu'il était poussé par maître
Régnier sur les tendances de consommation en Norvège, 10
on lui a posé des questions sur la consommation et par
les Norvégiens généralement et par les jeunes
Norvégiens.

Et monsieur Waterson a, je pense que c'est à
trois (3) reprises mais c'est à au moins deux (2), fait 15
référence à une étude venant du WHO, de l'OMC, pardon,
de l'OMS, faisant valoir que, en fait, il y a plus de
jeunes Norvégiens qui fument maintenant qu'avant. Et
maître Régnier s'est plu à ne pas demander le document.
Alors, je le demande. 20

Me MAURICE REGNIER:

Votre Seigneurie, le témoin a fait plusieurs
références qui étaient générales, qui n'ont été jamais
supportées par aucun document. Ce n'est pas à moi à
déposer le document. Si le témoin, il l'avait eu, il 25

n'avait qu'à nous l'indiquer et, là, j'aurais eu le temps de l'étudier.

Je ne l'ai pas étudié. Si mon confrère veut le déposer, je vais demander, à ce moment-là, que le témoin soit disponible pour la Cour demain matin, si j'ai des questions à lui poser là-dessus. 5

LA COUR:

Est-ce que ça va faire partie des documents de preuve extrinsèque que vous pourrez adresser à votre collègue, à un moment donné, de façon à ce que... 10
Parce que c'est un document du... de l'organisation...

Me SIMON POTTER:

En fait, maître Régnier a ce document depuis le mois de décembre. Monsieur Waterson a, lui-même, fait référence à ce document en l'adoptant comme source de sa prétention que, loin d'avoir eu une réduction de consommation chez les jeunes en Norvège, il y a eu une augmentation. 15

LA COUR:

Est-ce que je vais vraiment avoir besoin de ça? 20
C'est une question que je pose. Allez-vous faire référence...

Me SIMON POTTER:

Nous allons accepter la suggestion de la Cour, Votre Seigneurie, et trouver des extraits de cela et 25

nous en servir en preuve extrinsèque.

Me MAURICE REGNIER:

Ou vous vous en servez, ou vous ne vous en servez pas.

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LA COUR:

Pour l'instant, il ne s'en sert pas.

Me MAURICE REGNIER:

Parfait.

Me SIMON POTTER:

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397 Q- And, Mr. Waterson, if we look at your Table 1, there's been the suggestion that your table fails to account correspondences. Your table is entitled "Change in per capita cigarette consumption since 1975". When we look at the percent change, which is given there, and which 15 is ranked, country by country, which two (2) years are compared?

A- The nineteen seventy-five (1975) and the year two thousand (2000).

398 Q- If smuggling in Canada took place, hypothetically, in 20 nineteen ninety-two (1992), nineteen ninety-three (1993), nineteen ninety-four (1994), nineteen ninety-five (1995), nineteen ninety-six (1996), but reabsorbed itself or reduced itself to normal levels by the year two thousand (2000), would that have affected your 25

comparison?

A- No, it would be very similar to the tea case where
normality reasserted itself as it were in the trend
line.

399 Q- Thank you very much, Mr. Waterson.

5

THE COURT:

That's it?

Me SIMON POTTER:

Yes.

THE COURT:

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400 Q- Thank you, sir, have a safe return in Great Britain.

A- Thank you.

AND FURTHER DEPONENT SAITH NOT

15

L'an deux mille un (2001), ce vingt-deuxième (22e) jour de janvier,

LA COUR:

Alors, si nous allons à demain matin... Avant 5
ça, vous avez des résumés à me présenter. J'imagine
que tout ça est prêt?

Me DOUGLAS MITCHELL:

Demain matin, vous allez avoir le résumé du
docteur Wilkinson. 10

LA COUR:

Vous y allez... vous n'essayez pas trop de
prendre de retard parce que je travaille, moi-même, au
jour le jour et je ne voudrais pas accumuler le retard,
de façon à ce que le jugement soit rendu rapidement. 15

It was a pleasure to see you, sir.

Dans le...

It was a pleasure, sir.

Qui sera là demain matin?

Me SIMON POTTER: 20

Le témoin Ricard sera là demain matin.

LA COUR:

En français ou en anglais?

Me SIMON POTTER: 25

En anglais.

LA COUR:

En anglais. Vous comptez l'interroger combien de
temps, vous?

Me SIMON POTTER:

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Moi, pendant les deux (2) jours, comme je dis...

LA COUR:

Ah! oui, bien, c'est...

Me SIMON POTTER:

... c'est possible que j'ambitionne un peu sur le 10
lundi qui suivra.

LA COUR:

O.K. Et de votre côté?

Me MAURICE REGNIER:

Alors, donc, je ne m'attendais pas préparer le 15
contre-interrogatoire avant lundi, à le contre-
interroger avant lundi. Par ailleurs, j'ai oublié de
vous apporter, Votre Seigneurie, ce matin, la liste des
documents que nous avons demandée de la partie
demanderesse... 20

LA COUR:

Quelqu'un l'a mise sur mon bureau.

Me MAURICE REGNIER:

Pardon?

25

LA COUR:

Quelqu'un l'a mise sur mon bureau.

Me MAURICE REGNIER:

Ah! bon.

LA COUR:

5

Elle est là.

Me SIMON POTTER:

Il y a, en fait, Votre Seigneurie, il faut voir ça, il y a deux (2) lettres qu'il faut voir dans cette demande. Il y a une lettre du dix (10) et une lettre 10 du onze (11). La lettre du onze (11) ajoute à la demande du dix (10).

LA COUR:

Alors, je croyais que c'était la même chose.

Me MAURICE REGNIER:

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En fait, il fallait juste que je sache qu'est-ce qui a été remis au Tribunal.

LA COUR:

La lettre du dix (10) et du onze (11).

Me SIMON POTTER:

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Vos lettres, comme ça a été demandé hier.

Me MAURICE REGNIER:

Non, parfait, mais je voulais juste...

LA COUR:

Non, c'était sur mon bureau, c'est ça, quelqu'un 25

a mis ça ici. Je les ai, je les garde.

Me MAURICE REGNIER:

Ah! bon, je ne le sais pas, ce n'est pas moi qui
l'ai envoyé.

LA COUR:

5

Non, non, mais elles étaient sur mon bureau. Ça
va.

Me MAURICE REGNIER:

Parfait. Et, donc, il va falloir probablement
prendre du temps, peut-être avant le contre- 10
interrogatoire de monsieur Ricard, pour régler cette
question.

LA COUR:

Avant le contre-interrogatoire?

Me MAURICE REGNIER:

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Oui. Parce qu'il y a des questions et des
documents qui vont lui être demandés.

LA COUR:

Il faut aussi vous entendre.

Me MAURICE REGNIER:

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Pardon?

LA COUR:

Il faut aussi vous entendre.

Me MAURICE REGNIER:

Oui, oui, bien, j'attends, ils connaissent, ils 25

savent ce que je veux et j'attends leur proposition.
Me SIMON POTTER:

Je pense que, sur ce point, Votre Seigneurie, je ne veux pas éterniser à quatre heures et vingt (4 h 20). Cependant, beaucoup de ces documents-là 5 sortent entièrement du territoire de monsieur Ricard qui, lui, n'a jamais fait que de marketing. Vous allez voir dans les listes, là, où on demande toutes sortes de documents scientifiques sur le contenu de toutes sortes de choses, sur des documents émanant même de 10 compagnies anglaises, ou internationales, ou japonaises. Ça sort entièrement du domaine de monsieur Ricard.

Ce serait très injuste de retarder le témoignage de monsieur Ricard et le progrès de ce procès aux 15 motifs ou avec le camouflage de ce document.

Me MAURICE REGNIER:

Votre Seigneurie, là, je pense que mon confrère n'a pas besoin de...

LA COUR:

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Ça va, on va déterminer ça un peu plus tard et, comme votre collègue a dit, il est quatre heures vingt (4 h 20). Je voulais seulement m'assurer que demain matin on avait quelqu'un. Maître Mitchell?

Me DOUGLAS MITCHELL:

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Oui, juste une question d'un autre témoin. J'ai
parlé au docteur Liston.

LA COUR:

Oui.

Me DOUGLAS MITCHELL:

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Il pourrait être disponible le premier (1^{er})
février, qui est un vendredi. Il ne peut être
disponible avant cette semaine, parce que vous vous
souviendrez qu'il était prévu pour la semaine, je
crois, vers le seize (16) février. Donc, il peut 10
devancer mais il... ou il commencerait la semaine
suivante. Mais il ne pourrait pas témoigner...

LA COUR:

Vous n'avez rien à lui demander?

Me DOUGLAS MITCHELL:

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Non, c'est ça.

LA COUR:

Et, vous, vous avez dit?

Me MAURICE REGNIER:

Une demi-journée.

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Me JULIE DESROSIERS:

Une demi-journée, oui.

LA COUR:

Une demi-journée, bon, mettez-le sur la glace
pour le premier (1^{er}) février. Est-ce qu'il y a des 25

problèmes? On faisait quoi le premier (1^{er}) février?

Me DOUGLAS MITCHELL:

C'est un vendredi, en principe, un congé.

LA COUR:

Ah! oui, c'est ça. Ce n'est pas merveilleux, ça. 5

C'est même... c'est la semaine prochaine, ça.

Me DOUGLAS MITCHELL:

Oui.

LA COUR:

Ah! ah, formidable. Alors, pour une demi- 10
journée, on continuera, à moins que... est-ce qu'il y
a quelqu'un qui se... avez-vous un problème majeur si
on peut libérer monsieur Liston pour le premier (1^{er}).

Me MAURICE REGNIER:

Oui, bien, en fait, ça va simplement, Votre 15
Seigneurie, dépendre de la tâche de préparation que va
représenter le contre-interrogatoire de monsieur
Ricard. Comme je vous dis, on n'a aucune idée des
sujets sur lesquels il va témoigner, il n'a pas produit
de rapport, il n'y pas produit de rapport. Alors, je 20
n'ai pas de... c'est plus difficile, pour moi,
d'évaluer la durée du contre-interrogatoire. Il va
falloir que j'entende son interrogatoire en chef et
ensuite évaluer la durée. Alors, c'est simplement ça.
Alors, est-ce que j'aurai le temps la semaine prochaine 25

de préparer également le contre-interrogatoire de monsieur Liston? C'est la seule question que je me pose. Mais si, à date, ça va bien...

LA COUR:

Mais, de toute façon, essayons-le.

5

Me MAURICE REGNIER:

... je pense que ça prend moins de temps que prévu.

LA COUR:

Plaisir.

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Me MAURICE REGNIER:

Alors, si je peux avoir une journée, peut-être, avant monsieur Liston, là, peut-être que le jeudi de libre pour l'interroger le vendredi, ça serait parfait.

LA COUR:

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Peut-être qu'on pourra faire ça, si vous avez... On s'ajustera mais je veux... Et, évidemment, vous vous préparez pour tout le reste là, comme ça se décale, vous nous trouvez des petits témoins.

Me SIMON POTTER:

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Très bien, Votre Seigneurie.

LA COUR:

Ça serait gentil de vous entendre. Bien. Alors, bonne soirée.

Me DOUGLAS MITCHELL:

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Monsieur le Juge, juste un dernier point sur vos réservations d'avion pour monsieur Power.

LA COUR:

Oui.

Me DOUGLAS MITCHELL:

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Maître Leclerc et moi, on a discuté, je crois qu'il serait préférable que vous achetiez un billet annulable et ouvert quant à la date de retour.

LA COUR:

Alors, vous dites un billet ouvert?

10

Me ?

Annulable et ouvert à la date de retour.

LA COUR:

Ah bon, ça existe, ça?

Me SIMON POTTER:

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C'est, bref, un billet plein prix... tarif.

AJOURNEMENT

CAUSE CONTINUEE LE 23 JANVIER 2002